

# **CUSTOMS BULLETIN AND DECISIONS**

**Weekly Compilation of**  
**Decisions, Rulings, Regulations, Notices, and Abstracts**  
**Concerning Customs and Related Matters of the**  
**U.S. Customs Service**  
**U.S. Court of Appeals for the Federal Circuit**  
**and**  
**U.S. Court of International Trade**

**VOL. 32**

**JULY 29, 1998**

**NO. 30**

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U.S. Customs Service

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Classification: C98/63 Through C98/95

Valuation: V98/11

## **NOTICE**

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# U.S. Customs Service

## *Treasury Decision*

### **ERRATUM**

(T.D. 98-62)

#### DETERMINATION OF ORIGIN OF GOODS PROCESSED IN A QUALIFYING INDUSTRIAL ZONE OR IN ISRAEL AND THE WEST BANK OR GAZA STRIP

In CUSTOMS BULLETIN, Volume 32, No. 27, dated July 8, 1998, on page 3, in the General Notices section, a Treasury Decision number was inadvertently omitted on the document entitled DETERMINATION OF ORIGIN OF GOODS PROCESSED IN A QUALIFYING INDUSTRIAL ZONE OR IN ISRAEL AND THE WEST BANK OR GAZA STRIP. The document also appeared in the Federal Register (63 FR 34960) on June 26, 1998. The document should be referenced in the future as T.D. 98-62.

Dated: July 13, 1998.

STUART P. SEIDEL,  
*Assistant Commissioner,*  
*Office of Regulations and Rulings.*



# U.S. Customs Service

## *General Notices*

DEPARTMENT OF THE TREASURY,  
OFFICE OF THE COMMISSIONER OF CUSTOMS,  
*Washington, DC, July 15, 1998.*

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

STUART P. SEIDEL,  
*Assistant Commissioner,*  
*Office of Regulations and Rulings.*

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### PROPOSED MODIFICATION OF CUSTOMS RULING RELATING TO COUNTRY OF ORIGIN MARKING REQUIREMENTS OF WATCH CASES AND PROPOSED REVOCATION OF CUSTOMS RULING RELATING TO MARKING REQUIREMENTS OF CLOCK MOVEMENTS AND CASES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of ruling letter concerning country of origin marking of watch cases and proposed revocation of ruling letter concerning marking of clock cases and movements.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Implementation Act, Pub. L. 103-182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs is proposing to modify a prior Customs ruling pertaining to the country of origin marking of watch cases and revoke a prior Customs ruling relating to country of origin marking of clock cases and movements. Comments are invited with respect to the correctness of the proposed action.

DATE: Comments must be received on or before August 28, 1998.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings,

Attention: Commercial Rulings Division, 1300 Pennsylvania Avenue NW, Washington, D.C. 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located on the 3rd Floor of the Ronald Reagan Building (Southwest entrance on 14th Street), 1300 Pennsylvania Avenue, N.W., Washington, D.C.

**FOR FURTHER INFORMATION CONTACT:** Burton Schlissel, Special Classification and Marking Branch, (202) 927-1034.

#### **SUPPLEMENTARY INFORMATION:**

##### **BACKGROUND**

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the country of origin marking requirements for watch cases and revoke a prior Customs ruling relating to the marking of watch and clock cases.

Section 134.43(b), Customs Regulations (19 CFR 134.43(b)), in conjunction with section 11.9 (19 CFR 11.9), provides that watches and clocks must be marked in accordance with the special requirements of Chapter 91, Additional U.S. Note 4, HTSUS, (19 U.S.C. 1202). This note requires that any watch/clock movement or case provided for in the subpart, whether imported separately or attached to any article provided for in the subpart, shall not be permitted to be entered unless conspicuously and indelibly marked by cutting, die-sinking, engraving, or stamping or mold-marking (either indented or raised), as specified in the provisions of the Note. Since these special marking requirements for watches/clocks are Congressionally enacted, the Customs Service has no authority to grant exceptions.

On February 25, 1998, Customs published in the CUSTOMS BULLETIN, Volume 32, No. 8, a notice revoking a ruling pertaining to the marking requirements of clock cases. Customs had ruled in the prior case that marking clock movements and cases with indelible ink or paint satisfies the special marking requirements of Additional U.S. Note 4 ("Note 4"). Customs stated in the notice that the prior ruling was in error as marking with indelible ink is not among the methods specified in Note 4. While the ruling applied to clock movements and cases, the special marking requirements are equally applicable to watch movements and cases.

It has come to Customs attention that there are two additional rulings issued prior to this notice which have allowed marking watch/clock cases with indelible ink. In NY 815146 dated October 10, 1995, Customs held that marking with permanent indelible ink on the back of clock cases would be allowable for purposes of the special marking requirements of Note 4. That ruling also held that the use of a metal plate instead of direct die sinking into the clock movement plate was accept-

able for purposes of the Note. In Headquarters Ruling Letter (HRL) 560457 dated August 4, 1997, Customs held that marking on the back of a watch case in permanent indelible ink was an acceptable marking for purposes of the special marking requirements. NY 815146 and HRL 560457 are set forth as "Attachment A" and "Attachment B", respectively.

Customs believes that NY 815146 and HRL 560457 are in error as marking watch and clock cases/movements with indelible ink is not among the methods of marking specified in Additional U.S. Note 4. Further, marking the back of a clock movement with a metal plate does not constitute cutting, die-sinking, engraving, stamping or mold-marking (either indented or raised), as specified in the provisions of the Note.

Consequently, Customs intends to revoke NY 815146 and modify HRL 560457. Before taking this action, we will give consideration to any written comments timely received. Proposed HQ 560881 revoking NY 815146 and proposed HQ 561066 modifying HRL 560457 are set forth as "Attachment C" and "D" respectively to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: July 8, 1998.

SANDRA L. BELL,  
(for John Durant, Director,  
Commercial Rulings Division.)

[Attachments]

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[ATTACHMENT A]

DEPARTMENT OF THE TREASURY  
U.S. CUSTOMS SERVICE  
New York, NY, October 10, 1995.

MAR-2-R:N3:344 815146  
Category: Marking

Ms. LAURIE EVERILL  
JCPENNEY PURCHASING CORPORATION  
P.O. Box 10001  
Dallas, TX 75301-0001

Re: The Special Marking Requirements for a clock movement and a clock case.

DEAR Ms. EVERILL:

In your letter dated September 21, 1995 you requested a ruling on marking for a clock movement and a clock case in accordance with the Special Marking Requirements of U. S. Additional Note 4, Chapter 91, Harmonized Tariff Schedule of the United States (Annotated), which states:

4. Special Marking Requirements: With the following exceptions, any movement or case provided for in this chapter, whether imported separately or attached to an article provided for in this chapter, shall not be permitted to be entered unless conspicuously and indelibly

marked by cutting, die-sinking, engraving, stamping or mold-marking (either indented or raised), as specified below. Movements with opto-electronic display only and cases designed for use therewith, whether entered as separate articles or as components of assembled watches or clocks, are excepted from the marking requirements set forth in this note. The special marking requirements for clocks are as follows:

(b) Clock movements shall be marked on the most visible part of the front or back plate to show:

- (i) the name of the country of manufacture;
- (ii) the name of the manufacturer or purchaser; and
- (iii) the number of jewels, if any.

(c) Clock cases provided for in this chapter shall be marked on the most visible part of the outside of the back to show the name of the country of manufacture.

You have submitted two samples—a clock movement and a wooden portion of a clock case measuring 6 1/4" x 3 1/8".

The back plate of the clock movement is die-sunk with the words "No Jewel—Made in China." The back plate also has a small metal plate permanently attached thereto bearing the words WEI HAIPS MADE IN CHINA.

The portion of the clock case is stamped with black indelible ink bearing the words MADE IN CHINA.

The above markings for your clock movement and clock case are acceptable for the Special Marking Requirements. The use of the small metal plate rather than direct die-sinking into the plate itself is also acceptable.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Stanley Schwartz at 212-466-5895.

ROGER J. SILVESTRI,

*Director,*

*National Commodity Specialist Division.*

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[ATTACHMENT B]

DEPARTMENT OF THE TREASURY

U.S. CUSTOMS SERVICE,

Washington, DC, August 4, 1997.

MAR-05 RR:TC:SM 560457 BLS

Category: Marking

Tariff No. Subheading 9111.90.70

ROBERT L. EISEN, ESQ.

CLAIRE R. KELLY, ESQ.

COUDERT BROTHERS

1114 Avenue of the Americas

New York, NY 10036-7703

Re: Special marking requirements for watches; watch cases; Additional U.S. Note 4, Chapter 91, HTSUS; Subheading 9111.90.70.

DEAR MR. EISEN AND MS. KELLY:

This is in reference to your letter dated May 6, 1997, on behalf of E. Gluck Corporation ("E. Gluck"), requesting a ruling concerning the special marking requirements under Additional U.S. Note 4, Chapter 91, Harmonized Tariff Schedule of the United States (HTSUS), as applied to certain watch cases. Samples are submitted with the request.

*Facts:*

E. Gluck is an importer of mens' and ladies' musical quartz analog watches. The watch cases for these musical watches are made in China and comprised of a base metal plate, a

circular stainless steel (or plastic) outer case back and a circular "transducer" (a device used to convert energy from one form to another). You state that the transducer is permanently affixed to the outer case back by means of a double-sided industrial adhesive tape specifically formulated for this application, and that the parts cannot be separated without considerable effort. It is also our understanding that the case back has six evenly spaced openings molded into the metal, and the transducer covers all six openings when it is affixed. An inspection of the sample confirms that the two parts are permanently affixed as represented.

When the case back is placed on the case (and the transducer and outer case back are pressed flush to the movement) the transducer element of the case back is able to convert electrical signals from the movement in the watch into sound energy in order to provide the musical feature in the watch.

E. Gluck proposes to mark the watch cases "**E. Gluck Corp., China**" on the inside of the case back (on the transducer portion or inner case back) by means of a permanent indelible ink stamp.

*Issue:*

1) Whether the proposed marking satisfies the special marking requirements under Additional U.S. Note 4, Chapter 91, HTSUS ("Additional U.S. Note 4").

*Law and Analysis:*

Additional U.S. Note 4 requires that any watch movement, or case provided for in the subpart, whether imported separately or attached to any article provided for in the subpart, shall not be permitted to be entered unless conspicuously and indelibly marked by cutting, die-sinking, engraving, stamping, or mold-marking (either indented or raised), as specified in the provisions of this note.

Paragraph (c) of Additional U.S. Note 4 requires that watch cases shall be marked on the inside or outside of the back cover to show the name of the country of manufacture, and the name of the manufacturer or purchaser. The country of manufacture in these requirements refers to where the cases are manufactured rather than where the watch was made. The special marking must be accomplished by one of the methods specified in the Note.

Part 134, Customs Regulations (19 CFR Part 134), which implements the country of origin marking requirements and exceptions of 19 U.S.C. 1304, also incorporates the special marking requirements under Chapter 91. Specifically, section 134.43(b), (19 CFR 134.43(b)), in conjunction with section 11.9, (19 CFR 11.9), provides that watches must be marked in accordance with the special marking requirements set forth in Additional U.S. Note 4. This marking is, however, mandatory. The Customs Service has no authority for granting exceptions to the special marking requirements for watches.

You believe that when permanently affixed to the case back, the transducer becomes a component of the case back, which is now comprised of two parts, the outer portion of the back and the inner transducer portion of the back. Therefore, you believe that the proposed marking "**E. Gluck Corp., China**", on the transducer, which you consider to be a portion of the back case, by means of a permanent indelible ink stamp, satisfies the requirements of Additional U.S. Note 4.

Whether an article is a part of another article depends on the nature of the so-called "part" and its usefulness, function and purpose in relation to the article in which it is designed to serve. *Kores Manufacturing Inc. v. United States*, 3 CIT 178, 179 (1982), aff'd, 4 ITRD 1866 (CAFC 1983). We find that the transducer element, which is permanently affixed to the outer case back, forms an integral part of the watch case back and therefore the case. Based upon the facts, the transducer acts to protect the watch case from dust, water, debris, etc., by covering the six openings in the case back. It is also integral to the proper functioning of the case as it and the outer case back, by pressing the transducer against the watch movement, provides the sound energy for the watch. As part of the case back, the transducer is classifiable under subheading 9111.90.70, Harmonized Tariff Schedule of the United States (HTSUS), as other parts of watch cases.

Accordingly, since the transducer is considered part of the case back, Additional U.S. Note 4 may be satisfied in this case by the marking "**E. Gluck Corp., China**" on the transducer portion of the watch case (or inner case back) by means of a permanent indelible ink stamp.

*Holding:*

A transducer permanently affixed to the outer case back of a watch is considered part of the case back and is classifiable under subheading 9111.90.70, HTSUS, as other parts of

watch cases. Therefore, the marking "E. Gluck Corp., China" on the transducer portion of the watch case (inner case back) by means of a permanent indelible ink stamp, indicating the purchaser and country of origin of the watch case, satisfies the marking requirements of Additional U.S. Note 4, HTSUS.

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is entered. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JOHN DURANT,

*Director,*

*Tariff Classification Appeals Division.*

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[ATTACHMENT C]

DEPARTMENT OF THE TREASURY  
U.S. CUSTOMS SERVICE,  
Washington, DC.

MAR-05 RR:TC:SM 560881 BLS  
Category: Marking

Ms. LAURIE EVERILL  
JC PENNEY PURCHASING CORPORATION  
PO. Box 10001  
Dallas, TX 75301-0001

Re: Special Marking Requirements pertaining to clock movement and case; revocation of NY 815146.

DEAR MS. EVERILL:

This is in further reference to your letter dated September 21, 1995, in which you requested a ruling pertaining to the special marking requirements for clock cases and movements. Samples were submitted with the request.

*Facts:*

The record reflects that the sample clock movement has a metal plate attached to the back plate bearing the words WEI HAIPS MADE IN CHINA. The sample clock case is stamped with indelible ink bearing the words MADE IN CHINA.

In NY 815146 dated October 10, 1995, Customs held that marking the clock case with indelible ink and the movement with a metal tag satisfied the special marking requirements of Note 4.

*Issue:*

Whether the marking satisfies the special marking requirements of Additional U.S. Note 4, Harmonized Tariff Schedule of the United States (HTSUS).

*Law and Analysis:*

Section 134.43(b), Customs Regulations (19 CFR 134.43(b)), in conjunction with section 11.9, Customs Regulations (19 CFR 11.9), provides that clocks must be marked in accordance with the special requirements of Chapter 91, Additional U.S. Note 4 of the Harmonized Tariff Schedule of the United States (HTSUS) (19 U.S.C. 1202). This note (hereinafter "Note 4") requires that any clock movement or case provided for in the subpart, whether imported separately or attached to any article provided for in the subpart, shall not be permitted to be entered unless conspicuously and indelibly marked by cutting, die-sinking, engraving, or stamping or mold-marking (either indented or raised), as specified in the provisions of the Note. This marking is mandatory.

In Headquarters Ruling Letter (HRL) 559066 dated May 12, 1995, we held that printing on a clock case in ink did not satisfy the special marking requirements for clock cases because the marking was accomplished by a method other than those specified in Note 4. Under the special marking requirements, the methods of marking clock movements and clock cases are identical. See also HRL 734860 dated March 3, 1993 (marking on a gold foil sticker

on the bottom of a clock case was not a method prescribed by the special marking requirements and the marking was not in a proper location) and HRL 559934 dated October 23, 1996 (marking with an adhesive sticker was not in accordance with the requirements of Note 4).

Accordingly, as applied to the subject case, we find that marking with indelible ink and with a metal plate do not satisfy the special marking requirements for clock cases and movements because the markings are not effected by one of the methods specified in Note 4. Unlike cutting, die-sinking, engraving, or stamping, these methods of marking do not leave a permanent impression in the clock case or movement. As previously stated, Customs has no authority to grant an exception to the statutory marking requirements under Note 4.

*Holding:*

Marking a clock case with indelible ink and a clock movement with a metal plate do not satisfy the special marking requirements of Additional U.S. Note 4, HTSUS, as these methods of marking do not constitute cutting, die-sinking, engraving, stamping or mold-marking (either indented or raised), the only methods of marking permitted under the Note.

NY 815146 is revoked in accordance with this decision.

JOHN DURANT,

*Director,  
Commercial Rulings Division.*

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[ATTACHMENT D]

DEPARTMENT OF THE TREASURY

U.S. CUSTOMS SERVICE

*Washington, DC.*

MAR-05 RR:TC:SM 560457 BLS

Category: Marking

Tariff No. Subheading 9111.90.70

ROBERT L. EISEN, Esq.

CLAIRE R. KELLY, Esq.

COUDERT BROTHERS

*1114 Avenue of the Americas*

*New York, NY 10036-7703*

Re: Modification of HRL 560457; special marking requirements for watches; watch cases; Additional U.S. Note 4, Chapter 91, HTSUS.

DEAR MR. EISEN AND MS. KELLY:

This is in further reference to your letter dated May 6, 1997, on behalf of E. Gluck Corporation ("E. Gluck"), in which you requested a ruling concerning the special marking requirements under Additional U.S. Note 4, Chapter 91, Harmonized Tariff Schedule of the United States (HTSUS), as applied to certain watch cases. We issued HRL 560457 (August 4, 1997) in response to your request.

*Facts:*

E. Gluck is an importer of mens' and ladies' musical quartz analog watches. The watch cases for these musical watches are made in China and comprised of a base metal plate, a circular stainless steel (or plastic) outer case back and a circular "transducer" (a device used to convert energy from one form to another). You state that the transducer is permanently affixed to the outer case back by means of a double-sided industrial adhesive tape specifically formulated for this application, and that the parts cannot be separated without considerable effort. It is also our understanding that the case back has six evenly spaced openings molded into the metal, and the transducer covers all six openings when it is affixed. An inspection of the sample confirms that the two parts are permanently affixed as represented.

When the case back is placed on the case (and the transducer and outer case back are pressed flush to the movement) the transducer element of the case back is able to convert

electrical signals from the movement in the watch into sound energy in order to provide the musical feature in the watch.

E. Gluck proposes to mark the watch cases "**E. Gluck Corp., China**" on the inside of the case back (on the transducer portion or inner case back) by means of a permanent indelible ink stamp.

*Issue:*

- 1) Whether the proposed marking satisfies the special marking requirements under Additional U.S. Note 4.

*Law and Analysis:*

Additional U.S. Note 4, Harmonized Tariff Schedule of the United States (HTSUS) ("Note 4"), requires that any watch movement, or case provided for in the subpart, whether imported separately or attached to any article provided for in the subpart, shall not be permitted to be entered unless conspicuously and indelibly marked by cutting, die-sinking, engraving, stamping, or mold-marking (either indented or raised), as specified in the provisions of this note.

In HRL 560457 dated August 4, 1997, Customs found that the transducer forms an integral part of the watch case back and therefore the case. As part of the case back, we held that the transducer is classifiable under subheading 9111.90.70, HTSUS, as other parts of watch cases. We also held that since the transducer is considered part of the case back, Note 4 may be satisfied by the marking "**E. Gluck Corp., China**" on the transducer portion of the watch case (or inner case back) by means of a permanent indelible ink stamp.

HRL 560457 is in error in holding that indelible ink marking satisfies the special marking requirements of Note 4, as it is not one of the methods of marking specified in the note. The methods of marking delineated in Note 4 are mandatory. The Customs Service has no authority for granting exceptions to the special marking requirements for watches.

*Holding:*

A transducer permanently affixed to the outer case back of a watch is considered part of the case back and is classifiable under subheading 9111.90.70, HTSUS, as other parts of watch cases. However, the marking "**E. Gluck Corp., China**" on the transducer portion of the watch case (inner case back) in indelible ink indicating the purchaser and country of origin of the watch case does not satisfy the special marking requirements of Note 4, HTSUS, as indelible ink marking is not one of the methods specified in the note. HRL 560457 is modified in accordance with this ruling.

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is entered. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JOHN DURANT,  
*Director,*  
*Tariff Classification Appeals Division.*

**PROPOSED MODIFICATION OF RULING LETTER RELATING  
TO TARIFF CLASSIFICATION OF NEODYMIUM-IRON-  
COBALT ALLOY INGOTS**

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling relating to the tariff classification under the Harmonized Tariff Schedule of the United States (HTSUS) of neodymium-iron-cobalt alloy ingots. These products are produced by melting the constituent materials in an electric arc furnace then casting the ingots. After importation, the products are used to make magnets. Customs invites comments on the correctness of the proposed modification.

DATE: Comments must be received on or before August 28, 1998.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Submitted comments may be inspected at the same location during regular business hours.

FOR FURTHER INFORMATION CONTACT: James A. Seal, Commercial Rulings Division (202) 927-0760.

**SUPPLEMENTARY INFORMATION:**

**BACKGROUND**

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling relating to the tariff classification of neodymium-iron-cobalt alloy ingots. Customs invites comments on the correctness of the proposed modification.

NY A86780, dated October 18, 1996, held, in part, that M4392 neodymium-iron-cobalt alloy ingots were classifiable in subheading 7202.99.50, HTSUS, as other ferroalloys. This ruling was based on the belief that the product met the Chapter 72, Note 1(c), HTSUS, definition for *Ferroalloys*. NY A86780 is set forth as "Attachment A" to this document.

It is now Customs position that despite the requisite metallurgy, because these ingots are not shown to be commonly used as an additive in

the manufacture of other alloys or as deoxidants, desulfurizing agents or for similar uses in ferrous metallurgy, they do not meet the full requirements of Note 1(c). Because these ingots are cast articles and no other HTSUS provision has been shown to apply, they are classifiable in subheading 7325.99.50, HTSUS, as other cast articles of iron or steel. HQ 960824, modifying NY A86780, is set forth as "Attachment B" to this document. Before taking this action, we will give consideration to any written comments timely received.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Date: July 13, 1998.

MARVIN AMERNICK,  
(for John Durant, Director,  
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY  
U.S. CUSTOMS SERVICE,  
New York, NY, October 18, 1996.  
CLA-2-28:RR:NC:1:236 A86780  
Category: Classification  
Tariff No. 2846.90.8000 and 7202.99.5040

MR. JOSEPH STINSON  
FW MYERS & CO. INC.  
9111 La Cienega Boulevard  
Suite 207  
Inglewood, CA 90301

Re: The tariff classification of M4392 Neodymium-Iron-Cobalt Alloy and Neodymium Oxide Powder from China.

DEAR MR. STINSON:

In your letter dated August 15, 1996, on behalf your client Magnequench International, you requested a tariff classification ruling.

The applicable subheading for M4392 Neodymium-Iron-Cobalt Alloy will be 7202.99.5040, Harmonized Tariff Schedule of the United States (HTS), which provides for ferroalloys: Other: Other: Other: Other. The rate of duty will be 5 percent ad valorem.

The applicable subheading for Neodymium Oxide Powder will be 2846.90.8000, HTS, which provides for compounds, inorganic or organic, of rare-earth metals, of yttrium or of scandium, or of mixtures of these metals: Other: Other: Other. The rate of duty will be 3.7 percent ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist V. Gualario at 212-466-5744.

ROGER J. SILVESTRI,  
Director,  
National Commodity Specialist Division.

## [ATTACHMENT B]

DEPARTMENT OF THE TREASURY  
U.S. CUSTOMS SERVICE,  
Washington, DC.  
CLA-2 RR:CR:GC 960824 JAS  
Category: Classification  
Tariff No. 7325.99.50

MR. FRED BREWER  
MAGNEQUENCH INTERNATIONAL, INC.  
6435 Scatterfield Rd.  
Anderson, IN 46013

Re: NY A86780 Modified; Neodymium-Iron-Cobalt Alloy Ingots; Powdered Product Used to Make Magnets; Ferroalloy, Chapter 72, Note 1(c); Heading 7202; Steel, Chapter 72, Note 1(d); Cast Articles of Iron or Steel, Heading 7325.

DEAR MR. BREWER:

NY A86780, issued to a Customs broker on your behalf on October 18, 1996, in part classified M4392 neodymium-iron-cobalt alloy ingots in subheading 7202.99.50, Harmonized Tariff Schedule of the United States (HTSUS) as other ferroalloys. We have reconsidered this classification and believe it is incorrect. The classification of neodymium powder also addressed in NY A86780 is not in issue here.

*Facts:*

The merchandise in question, M4392 neodymium-iron-cobalt alloy, is made by melting either pure neodymium or eutectic (88% neodymium and 12% iron) neodymium ingots in an electric induction furnace with iron in the form of steel billets, cobalt in the form of broken cathodes, and irregularly shaped ferroboron pieces. The resulting alloy is cast into ingots, typically measuring 6 inches in diameter and 10 inches in length. This is the condition of the product as imported. The chemistry of this imported ingot is 27-29% rare earth elements (typically neodymium), 63% iron, 4.7-5.3% cobalt, and 1% other elements. After importation, the ingots are melted and ejected onto a chilled rotating wheel in a jet cast process. This rapid solidification cools or quenches the molten metal into flakes which are then crushed into powder form. The powder is used to make magnets for computers, anti-lock brakes, etc.

The provisions under consideration are as follows:

7202	Ferroalloys:
7202.99	Other
7202.99.50	Other * * * 5 percent ad valorem
*	*
7325	Other cast articles of iron or steel:
7325.99	Other
7325.99.50	Other * * * 3.5% ad valorem

*Issue:*

Whether the neodymium-iron-cobalt alloy is a ferroalloy for tariff purposes.

*Law and Analysis:*

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

Chapter 72, Note 1(c), HTSUS, in relevant part, defines *Ferroalloys* to include alloys in pigs, blocks, lumps, or similar primary forms, or in forms obtained by continuous casting, commonly used as an additive in the manufacture of other alloys or as deoxidants, desulfurizing agents or for similar uses in ferrous metallurgy and generally not usefully malleable, containing by weight 4% or more of the element iron and a total of more than 10% of other elements, excluding carbon.

The percentage of iron and rare earth elements brings the product within the chemical composition defined in Note 1(c). However, literature submitted in connection with the

ruling request that resulted in NY A86780 contains the following statement with respect to the imported neodymium-iron-cobalt alloy ingot that, after importation, is reduced to flakes, then to powder form "We use this powder to produce fully-dense "MQ2" and "MQ3" magnets. Annealed, the powder is sold as "MQP" to customers who wish to make their own bonded magnets or is used in-house to produce our line of "MQ1" bonded magnets. The company specification for the product designated M4392 states it "[c]overs a purchased cast metal product to be used in the manufacture of Magnequench magnet material." Lacking other information, these statements compel the conclusion that the imported product is not commonly used as an additive in the manufacture of other alloys or as deoxidants, desulfurizing agents or for similar uses in ferrous metallurgy. The product is not a ferroalloy as defined in Chapter 72, Note 1(c), HTSUS.

Heading 7224 covers other alloy steel in ingots or other primary forms. However, the ingots of this heading are subsequently rolled or forged generally into semifinished products such as blooms, billets, slabs, etc., but sometimes directly into bars, sheets or other finished products. The post-importation processing, as described in this case, does not support classification of this product in any provision of heading 7224.

At importation, the M4392 neodymium-iron-cobalt alloy ingot is a cast article. Heading 7325, other cast articles of iron or steel, covers all cast articles of iron or steel, not elsewhere specified or included, other than recognizable parts of machinery or mechanical appliances, or castings considered, for tariff purposes, as being unfinished articles of other headings. Lacking evidence of a more specific provision for the ingots in question, we conclude that they are cast articles of heading 7325.

*Holding:*

M4392 neodymium-iron-cobalt alloy castings are provided for in heading 7325. They are classifiable in subheading 7325.99.50, HTSUS. NY A86780, dated October 18, 1996, is modified accordingly.

JOHN DURANT,  
Director,  
Commercial Rulings Division.

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## MODIFICATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF DOLL ACCESSORIES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying a ruling pertaining to the tariff classification of certain doll accessories under the Harmonized Tariff Schedule of the United States (HTSUS). Notice of the proposed modification was published on May 27, 1998, in Volume 32, Number 21 of the CUSTOMS BULLETIN. One comment, agreeing with the proposed modification, was received in response to this notice.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after September 28, 1998.

FOR FURTHER INFORMATION CONTACT: Mary Beth McLoughlin, General Classification Branch (202) 927-2404.

## SUPPLEMENTARY INFORMATION:

## BACKGROUND

On May 27, 1998, notice of the proposed modification of NYRL A88584 was published in Volume 32, Number 21 of the CUSTOMS BULLETIN. One comment, agreeing with the proposed modification, was received in response to this notice. Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying a ruling pertaining to the tariff classification of certain doll accessories under the HTSUS.

In New York Ruling Letter (NYRL) A88584 dated November 7, 1996, Customs classified a variety of articles sold in the American Girls Collection, including articles identified as a sewing kit, nosegay, cloth basket lining and folder. The components of the sewing kit were classified separately, the nosegay was classified as an artificial flower, the cloth basket lining as a textile article and the folder as an article of plastic.

The dolls of the American Girls Collection are each representative of a particular time period in American history. The subject articles were designed by the importer's in-house design team as miniature replicas of real-life historically accurate articles. The articles have been sized to fit proportionally with their corresponding doll. The sewing kit includes an instruction sheet together with a needle, wooden quilting loop, embroidery thread, doll quilt, and 3 textile hearts to construct a quilt. The nosegay consists of 12 textile wound pink ribbon roses of man-made fiber attached to wire and paper stems which are wrapped together with three felt leaves to make a bouquet. Paper lace surrounds the base of the stems. The cloth basket lining is an oval-shaped black and white checkered cloth measuring approximately 5 inches x 4½ inches. It is hemmed with a string running through the hem for closure. The folder measures 4½ inches x 6 inches when folded. Each end has a nylon handle. The folder has no closure. Inside are a plastic pouch and two bands to hold various doll hair accessories. All of the articles are designed, produced, advertised and sold exclusively as accessories for a specific doll of the American Girls Collection.

Upon further examination, we are of the opinion that these articles are classifiable as accessories to dolls. In Headquarters Ruling Letter (HRL) 950695 dated July 21, 1992, we stated that an accessory is defined as a thing of secondary importance; an object or device not essential in itself but adding to the convenience or effectiveness of something else. Among other things, accessories may widen the range of uses of the main article. This concept was further refined in HRL 952942, dated April 27, 1993, in which we stated that to determine whether an article is an accessory, its nature, function, and purpose must be examined in relation to the article to which it is attached or designed to serve. The

subject articles add to the effectiveness of, and are designed to serve only the dolls of the American Girls Collection. The nature, function, and purpose of the subject articles indicate that they are accessories to dolls.

Therefore, Customs is modifying NYRL A88584 to reflect the proper classification of the doll accessories under subheading 9502.99.00, HTSUS, which provides for "[d]olls representing only human beings and parts and accessories thereof: [p]arts and accessories: [o]ther." HRL 960194 modifying NYRL A88584 is set forth as an attachment to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: July 14, 1998.

MARVIN AMERNICK,  
(for John Durant, Director,  
Commercial Rulings Division.)

[Attachment]

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[ATTACHMENT]

DEPARTMENT OF THE TREASURY  
U.S. CUSTOMS SERVICE  
Washington, DC, July 14, 1998.  
CLA-2 RR:CR:GC 960194 MMC  
Category: Classification  
Tariff No. 9502.99.00

ROBERT L. EISEN, Esq.  
KAREN BYSIEWICZ, Esq.  
COUDERT BROTHERS  
1114 Avenue of the Americas  
New York, NY 10036-7703

Re: NYRL A88584 modified; sewing kit, nosegay, cloth basket lining and folder; components to various retail packages sold as accessories to dolls of the American Girls Collection.

DEAR MR. EISEN AND MS. BYSIEWICZ:

This is in reference to your letter of February 7, 1997, on behalf of the Pleasant Company, requesting reconsideration of New York Ruling Letter (NYRL) A88584 dated November 7, 1996, classifying a variety of articles sold in the American Girls Doll Collection under the Harmonized Tariff Schedule of the United States (HTSUS). Among them were articles identified as a sewing kit, nosegay, cloth basket lining and folder. In NYRL A88584 the components of the sewing kit were classified separately, the nosegay was classified as an artificial flower, the cloth basket lining as a textile article and the folder as an article of plastic. You are now requesting reconsideration of the classification of these articles claiming the sewing kit is a toy set and that the other articles are parts and accessories to toy sets.

Samples as well as company literature were submitted with your initial request. In preparing this ruling, we have also considered the arguments you presented at a December 3, 1997, meeting as well as your additional written submission of January 23, 1998.

Pursuant to section 625(c)(1) Tariff Act of 1930 [19 U.S.C. 1625(c)(1)], as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agree-

ment Implementation Act, (Pub. L. 103-182, 107 Stat. 2057, 2186), notice of the proposed modification of NYRL A88584 was published, on May 27, 1998, in the CUSTOMS BULLETIN, Volume 32, Number 21. One comment, expressing agreement with the proposed classification, was received in response to the notice.

*Facts:*

The articles are described as follows:

- (1) A sewing kit which includes an instruction sheet together with components (a needle, wooden quilting loop, embroidery thread, doll quilt, and 3 textile hearts) to construct a quilt for the "Kristin" doll of the American Girls Collection. After importation, the sewing kit is combined with a hand carved wooden salt box containing field flowers, imitation strawberries and an imitation cake on a wooden platter to form an item identified as KBAP "Kristin's Party Treats." "Kristin's Party Treats" is advertised and sold exclusively as an accessory to the "Kristin" doll of the American Girls Collection.
- (2) A nosegay which consists of 12 textile wound pink ribbon roses of man-made fiber attached to wire and paper stems which are wrapped together with three felt leaves to make a bouquet. Paper lace surrounds the base of the stems. The article is sized so that it appears to be nosegay bouquet for the "Samantha" doll. After importation the nosegay will be combined with 4 imitation petit fours on a gold rimmed platter, two ice cream bombs, two fans, and an acrylic "favor" holder. The complete combination of goods is identified as SBAP "Samantha's Party Treats." "Samantha's Party Treats" is advertised and sold exclusively as an accessory to the "Samantha" doll of the American Girls Collection.
- (3) A black and white checkered, oval-shaped cloth basket lining which measures approximately 5 inches x 4½ inches. It is hemmed, with a string running through the hem for closure. After importation, the cloth basket lining will be placed in the "bait basket" which is combined with 3 imitation grasshoppers, a tiny imitation green frog, imitation trout, imitation fishing pole and wicker basket modeled after an early fishing creel. This complete combination of goods is identified as KAAN "Fishing Set." The "Fishing Set" is advertised and sold exclusively as an accessory to the "Kristin" doll of the American Girls Collection.
- (4) A folder identified as a carrying case for doll hair accessories. It measures 4½ inches x 6 inches when folded. Each end has a nylon handle. The folder has no closure. Inside are a plastic pouch and two bands to hold various doll hair accessories. After importation, the folder is combined with 8 elastic pony-Os, 6 twisty rollers, 3 butterfly clips, 2 sparklettes 1 piggy flip, and 1 pony-S to create item GTAS which is identified as "Hairdo Helper Hardware Kit" and is advertised and sold exclusively with the "American Gift of Today" doll of the American Gifts Collection.

Each doll of the American Gifts Collection is representative of a particular time period in American history. The subject articles were designed by the importer's in-house design team as miniature replicas of real-life historically accurate articles and are sized to fit proportionally with their corresponding doll. Once the importer's product designers have arrived at a design idea for a specific item, they seek a supplier or manufacturer overseas who will produce the item to the importer's specifications.

After importation, the articles are combined with others as described above and then sold exclusively through the importer's catalog. The catalog is the exclusive vehicle for the marketing and advertising for all of the importer's products.

*Issue:*

Whether the imported articles are accessories to dolls, accessories to toys sets or classifiable according to their constituent materials.

*Law and Analysis:*

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRI's). The systematic detail of the HTSUS is such that virtually all goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise

require, the remaining GRI's may then be applied. The following headings are under consideration:

- 3926 Other articles of plastics and articles of other materials of headings 3901 to 3914
- 4417 Tools, tool bodies, tool handles, broom or brush bodies and handles, of wood; boot or shoe lasts and trees, of wood
- 4911 Other printed matter, including printed pictures and photographs
- 6217 Other made up clothing accessories; parts of garments or of clothing accessories, other than those of heading 6212
- 6307 Other made up articles, including dress patterns
- 6702 Artificial flowers, foliage and fruit and parts thereof, articles made of artificial flowers, foliage or fruit
- 7319 Sewing needles, knitting needles, bodkins, crochet hooks, embroidery stilettos and similar articles for use in the hand, of iron or steel; safety pins and other pins of iron or steel, not elsewhere specified or included
- 9502 Dolls representing only human beings and parts and accessories thereof
- 9503 Other toys; reduced-size ("scale") models and similar recreational models, working or not; puzzles of all kinds; parts and accessories thereof

Note 2(v) to Chapter 39 and Note 1(p) to Chapter 44, both state, that: "[t]his chapter does not include: \* \* \* [a]rticles of chapter 95 (for example, toys, games, sports equipment)." Note 1(c) to Chapter 49, states, that: "[t]his chapter does not cover: (c) [p]laying cards or other goods of chapter 95." Section XI of the HTSUS, covers textiles and textile articles and includes Chapters 50 through 63 of the HTSUS. Note 1(t) to Section XI states, in pertinent part, that: "[t]his section does not cover: \* \* \* (t) [a]rticles of Chapter 95 (for example, toys, games, sports requisites and nets) \* \* \*." Note 1(e) to Chapter 67 states that: "[t]his chapter does not cover: (e) [t]oys, sports equipment, or carnival articles (chapter 95)." Finally, Note 1(1) to Section XV, which includes Chapter 73, states that: "[t]his section does not cover: (1) [a]rticles of chapter 95 (for example, toys, games, sports equipment)." Therefore, if the subject articles are described by any heading of Chapter 95, the various section and chapter notes indicate that the articles are excluded from classification in Chapters 39, 44, 49, 62, 63, 67, or 73. Accordingly, we must first determine if the subject articles are described by either heading 9502 or 9503, HTSUS. As heading 9502 is a more specific provision, we shall examine it first.

Headquarters Ruling Letter (HRL) 950695, dated July 21, 1992, concerned the classification of a musical mechanism sold with a doll which was designed to incorporate the musical unit in its body and play a lullaby when activated. In that ruling, we stated that an accessory is defined as a thing of secondary importance; an object or device not essential in itself, but adding to the convenience or effectiveness of something else. Among other things, accessories may widen the range of uses of the main article. Because the musical mechanism, although not essential in itself, added to the effectiveness and widened the range of use of the doll and by its particular shape and size, conveniently fit in the zipper compartment of the back of the doll, it was classified as an accessory to a doll. This concept was further refined in HRL 952942, dated April 27, 1993, in which we stated that to determine whether an article is an accessory, its nature, function, and purpose must be examined in relation to the article to which it is attached or designed to serve.

The samples, literature and submissions in this case, all clearly demonstrate that the subject articles add to the effectiveness of, and are designed to serve only the dolls of the American Girls Collection. The nature, function, and purpose of the articles indicate that they are accessories to dolls. All of the articles are specifically designed, produced, advertised and sold for a singular use with a particular doll of the American Girls Collection. Each of the articles is an imitation of an actual article from a specific time period which corresponds to the doll that represents that time period. Moreover, the articles have been specifically proportioned to doll size.

As the importer has demonstrated that the nature, function, and purpose of the subject articles is to solely add to the effectiveness of the dolls of the American Girls Collection, we find that the articles are classifiable under subheading 9502.99.00 as "[d]olls representing only human beings and parts and accessories thereof: [p]arts and accessories: [o]ther." Because heading 9502 is more specific than heading 9503, HTSUS, heading 9503 need not be considered. As the articles are described by Chapter 95, various section and chapter notes indicate that the articles are excluded from classification in Chapters 39, 44, 49, 62, 63, 67, or 73.

*Holding:*

The sewing kit, nosegay, cloth basket lining and folder are classifiable under subheading 9502.99.00, HTSUS, which provides for “[d]olls representing only human beings and parts and accessories thereof: [p]arts and accessories: [o]ther.” The applicable rate of duty is free.

NYRL A88584 dated November 7, 1996, is modified to reflect this ruling. In accordance with 19 U.S.C. §1625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations [19 CFR 177.10(c)(1)].

MARVIN AMERNICK,  
(for John Durant, Director,  
Commercial Rulings Division.)



# United States Court of International Trade

One Federal Plaza  
New York, N.Y. 10007

*Chief Judge*  
Gregory W. Carman

*Judges*

Jane A. Restani  
Thomas J. Aquilino, Jr.  
Richard W. Goldberg  
Donald C. Pogue

Evan J. Wallach  
Judith M. Barzilay  
Delissa Anne Ridgway

*Senior Judges*

James L. Watson  
Herbert N. Maletz  
Bernard Newman  
Dominick L. DiCarlo  
Nicholas Tsoucalas  
R. Kenton Musgrave

*Clerk*  
Raymond F. Burghardt



# Decisions of the United States Court of International Trade

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(Slip Op. 98-88)

UNITED STATES SHOE CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 94-11-00668

(Dated June 26, 1998)

## JUDGMENT

RESTANI, Judge: Upon consideration of Plaintiff's Motion for an Order Settling Interest and Costs, defendant's response thereto, and all other proceedings had herein; and

WHEREAS, a three-judge panel of this Court entered a judgment for plaintiff on December 4, 1995, declaring the Harbor Maintenance Tax as imposed upon merchandise exported from the United States to be unconstitutional, enjoining the United States Customs Service from the assessment and collection of the Harbor Maintenance Tax in connection with merchandise exported from the United States, and awarding plaintiff a money judgment in the amount of \$8,281.87, together with interest and costs as provided by law; and

WHEREAS this Court determined in Slip Op. 96-32 (February 7, 1996) that plaintiff is entitled to interest on the money judgment awarded in this case, pursuant to 28 U.S.C. § 2411; and

WHEREAS at the time the Court issued Slip Op. 96-32, the Government already had noticed an appeal of this case on February 1, 1996, and Slip Op. 96-32 specifically notes that "notice of appeal has been filed and the court lacks jurisdiction to alter the judgment;" and

WHEREAS the December 4, 1995 judgment of the Court in this case was affirmed by the United States Court of Appeals for the Federal Circuit on June 3, 1997, in *United States Shoe Corp. v. United States*, 114 F.3d 1564 (Fed. Cir. 1997); and

WHEREAS the decision of the United States Court of Appeals for the Federal Circuit in *United States Shoe Corp. v. United States* was affirmed by the Supreme Court of the United States on March 31, 1998, in *United States v. United States Shoe Corp.*, 118 S. Ct. 1290 (1988), which decision is now final; and

WHEREAS the stay of execution of the money judgment awarded to plaintiff and the effect of the declaratory and injunctive relief, ordered by the court on December 4, 1995, by its terms automatically dissolved upon "the conclusion of any appellate proceedings"; and

WHEREAS defendant expressly reserves any right remaining to appeal the award of interest or any costs in this case;

WHEREAS, the court has previously determined that costs shall be awarded as provided by law, the court has discretion to award costs, and plaintiff pursued diligently this test case of minor principal value; it is hereby

(1) ORDERED that further briefing is not required and Slip Op. 96-32 is hereby readopted as the opinion of the court on the issue of interest.

(2) ORDERED that defendant pay plaintiff the principal amount owing of \$8,281.87 within 60 days hereof;

(3) ORDERED that defendant pay plaintiff \$403.63 in costs within 60 days hereof;

(4) ORDERED that defendant pay plaintiff interest on the aforementioned \$8,281.87 principal, calculated under 28 U.S.C. § 2411, and that the payment obligation is stayed until 30 days after the time for appeal expires or appellate proceedings are complete.

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(Slip Op. 98-89)

LYKES PASCO, INC., PLAINTIFF v. UNITED STATES, DEFENDANT

Court No. 96-05-01307

[Defendant's motion to dismiss for lack of jurisdiction granted on the ground that a protest that referred the Customs Service to a specific list of 100 entries did not include 21 other entries involved in the same general dispute.]

(Decided June 29, 1998)

Collier, Shannon, Rill & Scott (*Paul C. Rosenthal, Laurence J. Lasoff, Lynn E. Duffy, Eric R. McClafferty*) for plaintiff.

Frank W. Hunger, Assistant Attorney General; Joseph I. Liebman, Attorney in Charge, International Trade Field Office; Civil Division, Dept. of Justice, Commerce Litigation Branch (*Mikki Graves Walser*), and Office of Assistant Chief Counsel, International Trade Litigation, United States Customs Service (*Chi S. Choy*) for defendant.

#### OPINION AND ORDER

WATSON, Senior Judge: This case is before the Court on defendant's motion to dismiss for lack of jurisdiction, and plaintiff's cross-motion for summary judgment. The motion to dismiss is found to be dispositive and the cross-motion for summary judgment is therefore not reached. The Court rejects plaintiff's argument that the motion to dismiss is so closely connected to the merits of the motion for summary judgment that its resolution should be deferred.

In support of its motion to dismiss, the government alleges that plaintiff failed to file a protest against the tariff treatment of the 21 entries in this case within 90 days of the notice of liquidation of the entries, thereby failing to meet the requirements of 19 U.S.C. § 1514 (c)(2)(A).

The 21 entries listed on the summons in this action were liquidated on December 18, 1992. Plaintiff argues that these 21 entries were included in Protest No. 1801-93-100022, made on March 16, 1993. The government maintains that the 21 entries were not included in that protest.

Close examination of the protest in question shows that the government is correct. The protest consisted of a Customs Form 19, an attachment entitled "Items Subject to Protest" and a further attachment entitled "Statement of Facts." The Customs Form 19, in its Section III, which is designated as "Detailed Reasons for Protest and/or Further Review" states as follows:

Lykes Pasco, Inc. is protesting the decision by the U.S. Customs Service to liquidate 100 entries at a reduced drawback rate. Attached hereto is a statement of the factual material and legal arguments that support this protest.

The first attachment to the Customs Form 19 is entitled "Items Subject to Protest." It consists of a list of 100 entries giving the port of entry, entry number, date of entry and liquidation date for each one of those 100 entries. The second attachment is entitled "Statement of Facts" and consists of a thirty-six page document with six sections.

It is not disputed that the 100 entries referred to on the Customs Form 19 and contained on the attached list of "Items Subject to Protest" do not include the 21 entries here at issue. The "Statement of Facts" had seventeen exhibits appended to it, including an audit report containing a list of the 21 entries here at issue, various correspondence between Customs and the plaintiff and a courtesy notice of liquidation provided by Customs, which document did not include the 21 entries here involved.

It is plaintiff's position that the references to the 21 entries, made in the attached narrative statement, were sufficient to include those 21 entries in the protest. In short, it is plaintiff's claim that "(a)lthough these 21 entries inadvertently were left off the summary list of entries protested, the narrative and its focus on the audit's findings clearly evidenced LPI's intention to cover these entries."

There is a long and noble line of jurisprudence in this court regarding the sufficiency of protests. It is well established that they need not be made with technical precision. *Davies et. al. v. Arthur*, 96 U.S. 148 (1878). It has been well stated that " \* \* \* the Court, taking a liberal posture, has held that, however cryptic, inartistic, or poorly drawn a communication may be, it is sufficient as a protest \* \* \* if it conveys enough information to apprise knowledgeable officials of the importer's intent and the relief sought." *Mattel, Inc. v. United States*, 72 Cust. Ct. 257, 262 CD 4547 (1974). However, a rule that tolerates a reasonable degree of generality in the making of protests will not benefit plaintiff in this case.

The high degree of precision in the main operative portion of this protest does not permit the same rationale as was applied in cases where the protest was lacking in specificity. In those cases it was possible for the court to reason that the outside parameters of the dispute had been sufficiently defined and brought to the attention of the Customs Service. It was therefore fair to require the Customs Service to respond with respect to the specific items and issues falling within those defined parameters. Here however, the burden that would be placed on the Customs Service would require it to go beyond the most exactly defined details of the protest, to realize that an inadvertence or omission has occurred, to incorporate its historical knowledge of the entire series of transactions that may have been involved and to make corrections. That is an unreasonable burden to place on the Customs Service. It would surpass anything that has been hitherto required by statute or case law. It would, in effect, alter the obligation of the protesting party to accurately state its objections to administrative action.

Moreover, in this case, the reading of plaintiff's intentions would not merely have required the Customs Service to realize that 21 additional entries belonged in the protest. The specific list of 100 also included eight entries that had been liquidated with the full amount of drawback desired by the plaintiff. It also included three entries that were not drawback entries at all. In short, the standard espoused by plaintiff would require Customs to "edit" a protest whose contents had been mistakenly formulated. It would not simply require Customs to address the details reasonably and necessarily contained within the identified limits. It would have been speculation by the Customs Service to conclude that the documents before it intended to challenge the tariff treatment of entries beyond the 100 specifically listed.

The fact that those 21 entries were part of a larger group of 23 that had been subjected to an audit, and the fact that the audit gave rise to a dispute about the amount of drawback is not enough to link them together so strongly that the specificity of the listing of 100 entries could be disregarded by the Customs Service.

The Customs Service was correct when it opined in its decision on plaintiff's application for further review of the protest involved here that "if the protestant had not enumerated each and every entry it desired to protest, but made a blanket statement that it intended to protest all the entries which were the subject of the 1987 audit \* \* \* the result would be different \* \* \*." It was correct in stating that Customs "cannot be expected to know with reasonable certainty that the protest was broader in scope than those listed '100' protested entries." There is no logical reason why, in certain instances, a general statement as to the matter being protested cannot be more comprehensive and effective than a highly detailed but narrow statement.

For the reasons given above, it is hereby ORDERED that defendant's motion to dismiss the action for lack of jurisdiction be, and the same hereby is, GRANTED.

(Slip Op. 98-90)

NTN BEARING CORP. OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORP, AND NTN CORP, PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND TIMKEN CO., DEFENDANT-INTERVENOR

Court Nos. 92-04-00257 and 92-03-00168

(Dated June 30, 1998)

### JUDGMENT

*Tsoucalas, Senior Judge:* The Court having received and reviewed the United States Department of Commerce, International Trade Administration's ("Commerce") *Final Results of Redetermination Pursuant to Court Remand, NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation and NTN Corporation v. United States, Slip Op. 96-150 (August 28, 1996) and Slip Op. 96-151 (August 29, 1996)* ("Remand Results"), and no party having submitted comments to the Remand Results, and Commerce having complied with the Court's Remand, it is hereby

ORDERED that the Remand Results are affirmed in their entirety; and it is further

ORDERED that, as all other issues have been decided, this case is dismissed.

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(Slip Op. 98-91)

McCORMICK & CO., INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 96-02-00613

[Plaintiff's motion for summary judgment granted on the ground that importation is tomato in powder form and its passage through a paste phase during production does not remove it from the provision for tomato powder or make it another sort of preserved tomato product.]

(Decided on July 1, 1998)

White & Case LLP (*Vincent Bowen*), for plaintiff.

Frank W. Hunger, Assistant Attorney General; Joseph I. Liebman, Attorney in Charge, International Trade Field Office; Civil Division, Dept. of Justice, Commerce Litigation Branch (*Mikki Graves Walser*), and Office of Assistant Chief Counsel, International Trade Litigation, United States Customs Service (*Beth C. Brotman*) for defendant.

### OPINION AND ORDER

*Watson, Senior Judge:* This action is before the Court on cross-motions for summary judgment. It involves tomato powder, a product made

by concentrating fresh tomatoes into paste and then spray-drying the paste into powder. It is plaintiff's claim that the product is covered by the terms of Subheading 0712.90.75 of the Harmonized Tariff Schedule of the United States ("HTSUS"), as tomatoes in powder form, not further prepared. The government contends that the importation was properly classified under Heading 2002.90.00 as tomatoes, prepared or preserved, other than as paste or puree. The disputed tariff provisions are as follows:

*CLAIMED*

0712 Dried vegetables, whole, cut, sliced, broken or in powder, but not further prepared:

\* \* \* \* \* \* \* \*  
0712.90 Other vegetables, mixtures of vegetables:

\* \* \* \* \* \* \* \*  
**0712.90.75 Tomatoes**

*CLASSIFIED*

2002 Tomatoes prepared or preserved otherwise than by vinegar or acetic acid:

2002.10.00 Tomatoes, whole or in pieces

\* \* \* \* \* \* \* \*  
2002.90.00 Other

Paste:

10 In containers \* \* \*  
20 Other

Puree:

30 In containers \* \* \*  
40 Other

**50 Other**

As between the competing provisions, the provision claimed by plaintiff has the virtue of appearing to describe the importation in its exact form. This immediately overcomes whatever initial presumption of correctness the classification may have.

The government takes the position that the imported merchandise was not prepared from the drying of a tomato but from the drying of a tomato that had first become a prepared vegetable product by transformation into paste.<sup>1</sup> By this logic, goes the argument, the final powder is a prepared or preserved tomato product but not a tomato "in powder."

The production method of the imported tomato powder is as follows: Freshly picked tomatoes are washed, sorted, and washed again. They go through a "cold break" process in which their naturally occurring pectin decomposes. The peels and seeds are screened out of the pulp. The pulp goes through a filtering machine which increases the solid content from

<sup>1</sup> It should be noted that, for tariff purposes, tomatoes are treated in accordance with their normal culinary use as vegetables rather than as the fruit which they are in a botanical sense.

5% to 18% by removing water. The resulting material is further concentrated in a vacuum operation that produces a concentrated material known as paste or concentrate. The paste is pasteurized, further concentrated in a rotary-film evaporator and pasteurized a second time. The material is then spray-dried; a small amount of silicon dioxide is added to prevent caking of the powder in transit, and the powder is packaged in plastic bags for shipping. The dry weight content of the finished material is 90 to 97%.

In the view of the Court, the position of the plaintiff regarding classification is far more plausible than that of the government. It is a strained argument to say that, because this importation passes through the form of paste in the course of one of the common methods for producing powder in the industry, it has therefore somehow lost its original identity as a tomato. This rather convoluted argument contradicts the otherwise quite orderly and harmonious relationship between the competing provisions in this case.

The plain language of Subheading 0712.90.75 specifically covers tomatoes in the form of the importations. This material has clearly been dried and is indubitably in powder form. There is no indication whatsoever that the manner in which the drying process was conducted or the intermediate stages through which the original vegetable passed, should have a bearing on the ultimate classification.

Chapter 7 of the HTSUS is notably comprehensive in its coverage of vegetables. Chapter 20 for preparations of vegetables is obviously designed to cover vegetables prepared or preserved by means other than those specified in Chapter 7 and it says so specifically in Note 1(a). Common sense dictates that if a vegetable appears in Chapter 7, specifically identified in its dried form, that drying is not a method of preparation intended to be included in Chapter 20. When we look at Heading 2002 we see a provision dealing with tomatoes in forms that are not dried within the ordinary understanding of that term, i.e. in whole form, in piece form or in the form of paste or puree.

It is also clear that, when it was intended that certain dried forms of vegetables *not* be included in Chapter 7, that exclusion was specifically noted. Thus, Note 3 to Chapter 7 specifically excludes such products as the dry forms of potatoes or leguminous vegetables.

The clarity of the tariff structure here and the clear distinction between the dry tomato products covered by Chapter 7 and the wetter ones of Chapter 20, could hardly be plainer.

Drying is a means of preservation. It is also settled that "a provision for an article dried is more specific than a provision for such article when 'otherwise prepared and preserved.'" *Sturm, Customs Law & Administration*, §54.7 (1991). A case well illustrating this point is *F.H. Shallus & Co., et. al. v. United States*, 18 CCPA 332, T.D. 44585 (1931). In the *Shallus* case, the Court of Customs & Patent Appeals held that egg albumen that was both dried and prepared must be classified as dried because the term "dried egg albumen" is more specific than "egg albumen prepared

and preserved." 18 CCPA at 334. The Appellate Court used the same reasoning in *United States v. Enbun, Co.*, 19 CCPA 79 T.D. 44224 (1931). That case involved dried, unsalted fish, which had also been shaved or shredded. The court held that drying was a form of preservation that made the language covering "dried fish" more specific than the language covering fish "otherwise prepared or preserved." It is worth noting that the court rejected the government's theory that the process of shredding or shaving the dried fish somehow removed it from the category of dried fish into the category of prepared fish. The argument made by the government in this case has even less merit because the intermediate paste condition of the imported material is only a temporary phase.

The government cites *United States v. A Sahadi & Co., Inc.*, 23 CCPA 293, T.D. 48165 (1936) in support of its position. Close examination of that decision, however, does not provide support for the government's classification in this case. That case involved the question of classification of a product derived from apricots. After picking, the fresh apricots were mashed and pressed through a sieve, separated from the skins and pits and the pulp was spread on boards in the sun. After drying for five or six days the resulting sheets were smeared with olive oil to prevent them sticking and then rolled into units of 5 pounds, 10 ounces and imported in that condition. The defendant emphasizes language in that opinion in which the appellate court pointed out that if the apricot paste or pulp, which had been spread out on the boards, had been brought to this country in an undried condition, it probably would have classified as a fruit paste under paragraph 752 of the Tariff Act of 1930. The court further observed that "a subsequent drying would not make the product dried apricots, but dried paste or pulp." This observation does not apply to the tomatoes involved in this case because it was addressed to an apricot product that had not been dried within the understanding of the court. In fact, the smearing with olive oil was a measure taken to prevent drying past a certain point. In addition, the legislative history perceived by the court militated against classification of the rolled sheets as dried apricots. Here, the plainly expressed ambit of the competing provisions is clear on its face and there is no need to go further.

For the reasons expressed above, the government's motion for summary judgment must be denied; the plaintiff's motion for summary judgment must be granted and it will be so ordered.

(Slip Op. 98-92)

TIMKEN CO., PLAINTIFF v. UNITED STATES, DEFENDANT AND  
KOYO SEIKO CO., LTD. AND KOYO CORP. OF U.S.A., DEFENDANT-INTERVENORS

Court No. 97-04-00562

Plaintiff, The Timken Company ("Timken"), moves for judgment on the agency record pursuant to Rule 56.2 of the Rules of this Court. Timken challenges the Department of Commerce, International Trade Administration's ("Commerce") final results of the administrative review, entitled *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan; Final Results of Antidumping Duty Administrative Reviews and Termination in Part ("Final Results")*, 62 Fed. Reg. 11,825 (Mar. 13, 1997). Timken claims Commerce erred in the Final Results by: (1) granting Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. (collectively "Koyo") a downward adjustment to U.S. indirect selling expenses for imputed interest expenses incurred in financing antidumping duty cash deposits; (2) failing to adjust U.S. prices for export selling expenses; (3) allowing a direct adjustment to normal value for Koyo's home market billing adjustments and rebates; and (4) making several clerical errors.

*Held:* This case is remanded to Commerce to: (1) determine the extent to which Koyo reported any positive values for inside cup diameters and outside cone diameters in its sales of U.S. cups and cones and to correct the computer program by setting the value of any positive inside cup diameters or outside cone diameters to zero in Koyo's U.S. summary sales database; and (2) ensure that no models are erroneously matched to constructed values in accordance with *Cemex, S.A. v. United States*, 113 F.3d 897 (Fed. Cir. 1998).

[Timken's motion for judgment on the agency record is granted in part and denied in part. Case remanded.]

(Dated July 2, 1998)

*Stewart and Stewart (Terence P. Stewart, James R. Cannon, Jr., William A. Fennell and Patrick J. McDonough) for plaintiff.*

*Frank W. Hunger, Assistant Attorney General; David M. Cohen, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (Lucius B. Lau); of counsel: Carlos A. Garcia, Attorney-Advisor, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.*

*Powell, Goldstein, Frazer & Murphy LLP (Peter O. Suchman, Neil R. Ellis, Elizabeth C. Hafner and Ronald E. Minsk) for defendant-intervenors.*

#### OPINION

*Tsoucalas, Senior Judge:* Plaintiff, The Timken Company ("Timken"), moves for judgment on the agency record pursuant to Rule 56.2 of the Rules of this Court. Timken challenges the Department of Commerce, International Trade Administration's ("Commerce") final results of the administrative review, entitled *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan; Final Results of Antidumping Duty Administrative Reviews and Termination in Part ("Final Results")*, 62 Fed. Reg. 11,825 (Mar. 13, 1997).

#### BACKGROUND

The administrative review at issue encompasses imports of tapered roller bearings ("TRBs") during the review period of October 1, 1994 through September 30, 1995. On November 6, 1996, Commerce published the preliminary results of the instant review. *See Tapered Roller*

*Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan; Preliminary Results of Anti-dumping Duty Administrative Reviews and Partial Termination of Administrative Reviews ("Preliminary Results"),* 61 Fed. Reg. 57,391. On March 13, 1997, Commerce published the Final Results at issue. See 62 Fed. Reg. 11,825.

Timken claims Commerce erred in the Final Results by: (1) granting Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. (collectively "Koyo") a downward adjustment to U.S. indirect selling expenses for imputed interest expenses incurred in financing antidumping duty cash deposits; (2) failing to adjust U.S. prices for export selling expenses; (3) allowing a direct adjustment to normal value ("NV") for Koyo's home market billing adjustments and rebates; and (4) making several clerical errors. Oral argument was held at the Court on June 24, 1998.

#### DISCUSSION

The Court has jurisdiction over this matter under 19 U.S.C. § 1516a(a)(2) (1994) and 28 U.S.C. § 1581(c) (1994).

The Court must uphold Commerce's final determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). "It is not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record." *Timken Co. v. United States*, 12 CIT 955, 962, 699 F. Supp. 300, 306 (1988), *aff'd*, 894 F.2d 385 (Fed. Cir. 1990).

Because the administrative review at issue was initiated after January 1, 1995, the applicable statutory provisions are the amendments made by the Uruguay Round Agreements Act ("URAA"), Pub. L. 103-465, 108 Stat. 4809.

#### *1. Offset to U.S. Selling Expenses for Imputed Interest on Cash Deposit of Estimated Dumping Duties:*

Commerce accepted Koyo's offset to U.S. indirect selling expenses for imputed interest payments on cash deposits of estimated dumping duties in this review. *Final Results*, 62 Fed. Reg. at 11,828. Timken claims that Commerce's most recent position is to deny the offset, indicating that Commerce has changed its stance on this issue and necessitating a remand to deny the adjustment to U.S. indirect selling expenses. Timken's Mem. Supp. Mot. J. Agency R. at 17-19.

Commerce responds that, despite its current position to deny the offset, its decision to grant the offset in this case was within Commerce's discretion. Def.'s Partial Opp'n to Mot. J. Agency R. at 15-18. Koyo agrees generally with the stance taken by Commerce, emphasizing that

the Court has a well-established position against retroactively applying changes in policy to reviews that have already been completed. Koyo's Opp'n to Mot. J. Agency R. at 6-10.

Commerce has waffled considerably in deciding how to deal with imputed interest payments on cash deposit, first granting then denying, followed by once again granting and, most recently, denying adjustments to U.S. indirect selling expenses. *See, e.g., Final Results of Antidumping Duty Administrative Reviews and Revocation in Part of an Antidumping Duty Order*, 58 Fed. Reg. 39,729, 39,749 (July 26, 1993) (granting the offset in 1991-92 AFB Review); *Final Results of Antidumping Duty Administrative Reviews; Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan*, 58 Fed. Reg. 64,720, 64,726 (Dec. 9, 1993) (granting the adjustment in the 1990-92 TRB Review); *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et al.; Final Results of Antidumping Duty Administrative Reviews, Partial Termination of Administrative Reviews, and Revocation in Part of Antidumping Duty Orders*, 60 Fed. Reg. 10,900, 10,918 (Feb. 28, 1995) (denying the offset in the 1992-93 AFB Review); *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan; Final Results of Antidumping Duty Administrative Reviews and Revocation in Part of an Antidumping Finding ("1992-93 TRB Final Results")*, 61 Fed. Reg. 57,629, 57,638 (Nov. 7, 1996) (denying the offset in the 1992-93 TRB Review); *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Singapore, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews*, 61 Fed. Reg. 66,472, 66,488-89 (Dec. 17, 1996) (granting the offset in the 1993-94 AFB Review); *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Singapore, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews*, 62 Fed. Reg. 2081, 2104-05 (Jan. 15, 1997) (granting the offset in the 1994-95 AFB Review); *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan; Final Results of Antidumping Duty Administrative Reviews*, 63 Fed. Reg. 2558, 2571 (Jan. 15, 1998) (denying the offset in the 1995-96 TRB Review). Nevertheless, this Court has consistently upheld the adjustment when Commerce has granted it in the final results and remanded for Commerce to allow the adjustment when Commerce has denied it in the final results. *See Timken Co. v. United States*, 21 CIT \_\_\_, \_\_\_, 989 F. Supp. 234, 250 (1997), modified, 22 CIT \_\_\_, Slip Op. 98-20 (Mar. 4, 1998) (remanding for Commerce to grant the adjustment in the 1992-93 TRB Review);

*NSK Ltd. v. United States*, 21 CIT \_\_\_, 969 F. Supp. 34, 55 (1997), amended, 21 CIT \_\_\_, Slip Op. 97-154 (Nov. 20, 1997) (remanding for Commerce to grant the adjustment in the 1992-93 AFB Review); *Federal-Mogul Corp. v. United States*, 20 CIT \_\_\_, 950 F. Supp. 1179, 1183 (1996), amended, 21 CIT \_\_\_, Slip Op. 97-9 (Jan. 22, 1997) (upholding Commerce's decision to grant the adjustment in the 1991-92 AFB Review).

Consequently, in accordance with this Court's consistent position, Commerce's decision to grant Koyo's offset to U.S. indirect selling expenses for imputed interest payments incurred in financing antidumping duty cash deposits is supported by substantial evidence and fully in accordance with law.

## 2. *Limiting U.S. Indirect Selling Expenses to Those Specifically Associated With Commercial Activity in the United States:*

The pre-URAA statute provided for the reduction of exporter's sales price ("ESP") by the amount of "expenses generally incurred by or for the account of the exporter in the United States in selling identical or substantially identical merchandise." 19 U.S.C. § 1677a(e)(2) (1988). Although the statute was silent as to whether indirect selling expenses incurred *outside* the United States should be categorized as U.S. indirect selling expenses, Commerce chose to adjust U.S. price for such expenses. See 19 C.F.R. § 353.41(e)(2) (1994); ITA Antidumping Manual, Ch.7, at 11 (rev. ed. July 1993).

As revised by the URAA, the statute states that constructed export price ("CEP"), the post-URAA equivalent to ESP, is to be reduced by the amount of any "expenses generally incurred by or for the account of the producer or exporter, or the affiliated seller in the United States" including "any selling expenses not deducted under subparagraph (A) [commissions], (B) [direct selling expenses], or (C) [selling expenses assumed by the seller on behalf of the purchaser]." 19 U.S.C. § 1677a(d)(1) & (d)(1)(D) (1994). In the Final Results, Commerce revised its previous practice and limited Koyo's U.S. indirect selling expenses to those expenses specifically associated with commercial activity in the United States. 62 Fed. Reg. at 11,834.

Timken claims that the new statutory language and the *Uruguay Round Agreements Act, Statement of Administrative Action* ("SAA"), at 153, H.R. Doc. 316, 103d Cong., 2d Sess., at 823 (1994), indicate that Congress intended for Commerce to continue the practice of including in U.S. indirect selling expenses the home market selling expenses attributable to export sales. Timken's Mem. Supp. Mot. J. Agency R. at 20-23. Timken further argues that Commerce's new practice improperly prevents CEP from being an ex-factory price and hinders a fair comparison because normal values are adjusted for indirect selling expenses up to the amount of U.S. indirect selling expenses when compared to CEP. *Id.* at 22-23 (citing *Agreement on Implementation of Article VI of the Generalized Agreement on Tariffs and Trade 1994*, at 147, H.R. Doc. No. 316, 103d Cong., 2d Sess., at 1455 (1994)). At oral argument, Tim-

ken stressed that subsection 1677a(d) specifically identifies the expenses Commerce should consider in arriving at CEP and, therefore, leaves no room for Commerce to exercise any discretion.

Commerce responds that it properly calculated Koyo's U.S. indirect selling expenses because the new statutory language does not define the types of expenses to be included as U.S. indirect selling expenses and because its interpretation limiting such expenses to those incurred in the United States is reasonable. Moreover, Commerce maintains that the legislative history to which Timken points is not relevant and that the SAA supports Commerce's position. Def.'s Partial Opp'n to Mot. J. Agency R. at 18-21. At oral argument, Commerce added that its interpretation is bolstered by the definition of the term "United States expenses" in 19 U.S.C. § 1677a(f)(2)(B) as the "total expenses described in subsection d(1) and (2)." Commerce further reasoned that the expenses at issue were incurred in the United States to promote the sale to the first unaffiliated customer.

Koyo emphasizes that the statutory language and SAA support Commerce's change. In particular, Koyo points to the SAA's statement that, under subsection 1677a(d), CEP should only be reduced by the expenses and profit associated with economic activities occurring in the United States. Koyo's Opp'n to Mot. J. Agency R. at 10-14 (citing *SAA*, at 153).

The Court first notes that, although the statutory language has changed, neither the pre-URAA statute nor the newly-amended statute address whether U.S. indirect selling expenses incurred outside the United States should be categorized as U.S. indirect selling expenses. Rather, in limiting Koyo's U.S. indirect selling expenses to those incurred in the United States, Commerce has chosen to alter its treatment of such expenses. This change does not involve any prejudicial reliance on Commerce's previous methodology, as it is not related to a respondent's method of collecting and organizing data. Consequently, the issue for the Court is whether Commerce's interpretation of the newly-amended statute is reasonable. As no relevant case law exists and the statutory language does not specifically address this issue, the Court must examine the reasonableness of Commerce's interpretation in light of the legislative history and the SAA.

The legislative history specifically states that it intends subsection 1677a(d)(1)(D) to, "as under the current practice, encompass those expenses that do not result from, or cannot be tied directly to specific sales, but that may reasonably be attributed to such sales." S. Rep. No. 412, 103d Cong., 2d Sess. 65 (1994) (emphasis added). This language does not specifically state that selling expenses incurred in the home market should be included in U.S. indirect selling expenses. Rather, at most, it indicates that Congress did not intend Commerce to change substantially what it includes as such expenses.

Although the Court is concerned with Commerce's sudden change in practice, Commerce is afforded significant deference in its statutory interpretation. *See Chevron U.S.A. Inc. v. Natural Resources Defense*

*Council, Inc.*, 467 U.S. 837 (1984). Moreover, as Koyo notes, the SAA supports Commerce's position, as it explicitly states that

[CEP] will be calculated by reducing the price of the first sale to an unaffiliated customer in the United States by the amount of the following expenses (and profit) associated with *economic activities occurring in the United States*: [listing the relevant expenses].

SAA, at 153 (emphasis added). Consequently, Commerce's decision to limit U.S. indirect selling expenses to those expenses incurred in the United States is supported by substantial evidence and fully in accordance with law.

### 3. *Adjustment to NV for Koyo's Home Market Billing Adjustments and Rebates:*

In the Final Results, Commerce unequivocally stated that it now regards Koyo's billing adjustments and rebates, known as post-sale price adjustments ("PSPAs"), as direct adjustments to price, as opposed to selling expenses. 62 Fed. Reg. at 11,837. As a result, Commerce accepted Koyo's PSPAs, even though they were not reported on a transaction-specific basis and even though the allocations Koyo used included rebates on non-scope merchandise.<sup>1</sup> *Id.* Commerce emphasized that its change in practice stems from subsection 1677m(e), the post-URAA statutory provision that directs it to consider information that is less than perfect. *Id.* Commerce reasoned that, although it continues to prefer respondents to report such PSPAs on a transaction-specific basis (or, where a single adjustment is made on a group of sales, as a fixed and constant percentage of the value of such sales), it recognizes that this is not always feasible, especially given the large volume of transactions involved in TRB reviews. *Id.* Finally, Commerce noted that, pursuant to post-URAA requirements, it accepted these adjustments only after determining that: (1) it was not feasible for Koyo to report them on a transaction-specific basis; and (2) Koyo's allocation method did not cause unreasonable inaccuracies and distortions. *Id.*

Timken claims that Commerce's acceptance of Koyo's PSPAs is a complete departure from its well-established, court-approved stance to allow such adjustments only when they are reported on a transaction-specific and scope-specific basis. Timken's Mem. Supp. Mot. J. Agency R. at 24-37. In particular, Timken contends that Commerce's practice has been to allow a direct adjustment to foreign market value, the pre-URAA equivalent to NV, only for expenses that are tied directly to the sales on which they were incurred. *Id.* at 26-28 (citing 1992-93 TRB Final Results, 61 Fed. Reg. at 57,640). Moreover, Timken maintains that subsection 1677m(e) is procedural in nature and, as such, has made no change to existing substantive law upholding such treatment. *Id.* at 24-26. Timken also points out that Commerce denied the Koyo adjust-

<sup>1</sup> NV is defined as "the price at which the foreign like product is first sold (or, in the absence of a sale, offered for sale) for consumption in the exporting country \*\*\*." 19 U.S.C. § 1677b(a)(1)(B)(i) (1994). By allowing the adjustments at issue, Commerce interpreted the term "price" in the NV definition as the price for the foreign like product after adjustments for PSPAs, hence viewing the PSPAs as direct adjustments to price, as opposed to expenses.

ments at issue in the Preliminary Results. *Id.* at 27-28. Finally, Timken challenges Commerce's factual determination that Koyo's PSPA allocations were reasonably accurate and non-distortive. *Id.* at 33-36.

Timken stressed at oral argument that, even if subsection 1677m(e) allows Commerce to take less than perfect information into consideration, Koyo has not acted to the best of its ability to provide the necessary data in Commerce's preferred form. Moreover, Timken points to the SAA requirement that Commerce take into account certain factors before accepting such information, including a respondent's: (1) size; (2) accounting systems; (3) computer capabilities; and (4) prior success in providing the requested information. *See SAA*, at 195.

Commerce responds that its decision was proper because subsection 1677m(e) directs Commerce to accept information that does not meet the agency's previous requirements. Def.'s Partial Opp'n to Mot. J. Agency R. at 21-31. At oral argument, Commerce reinforced this position, stating that it employed the institutional knowledge it has accumulated through years of Koyo verifications to determine that Koyo was incapable of providing data in Commerce's preferred form and that Koyo's information served as a reliable basis for making a determination.

Koyo agrees with Commerce's position, emphasizing that Commerce's new policy is not inconsistent with the statute or with relevant case law. Koyo's Opp'n to Mot. J. Agency R. at 14-26. Koyo stated at oral argument that the sheer volume of TRB transactions (approximately one million) prevented it from complying with Commerce's preferred form of response. Koyo added that the information Commerce requested was not necessary for Koyo's normal business operations and that to alter its computer database to comply with these requests would involve an enormous expense.

As a preliminary matter, the Court acknowledges that Commerce treated rebates and billing adjustments as selling expenses in preceding reviews under pre-URAA law. Moreover, this Court recognizes that it has previously decided that such adjustments are selling expenses and, therefore, should not be treated as adjustments to price. *See Koyo Seiko Co. v. United States*, 16 CIT 539, 542-43, 796 F. Supp. 1526, 1530 (1992). Nevertheless, this does not preclude Commerce's change in policy or this Court's reconsideration of its stance in light of the newly-amended antidumping statute.

The Court further notes that Timken's reliance on the 1992-93 TRB Final Results and on Commerce's denial of the PSPAs in the Preliminary Results is misplaced. First, the 1992-93 TRB Final Results determination was made under pre-URAA law. *See* 61 Fed. Reg. at 57,629 (stating that the results encompassed the review period of October 1, 1992, through September 31, 1993, long before the January 1, 1995, effective date for URAA amendments). Moreover, it is well-established that Commerce is not bound to its preliminary results position. *See, e.g., Peer Bearing Co. v. United States*, 22 CIT \_\_\_, \_\_\_, Slip Op. 98-70, at

20 (May 27, 1998); *Asociacion Colombiana de Exportadores de Flores v. United States*, 22 CIT \_\_\_, \_\_\_, Slip Op. 98-33, at 24-25 (Mar. 25, 1998).

Neither the pre-URAA nor the newly-amended statutory language imposes standards establishing the circumstances under which Commerce is to grant or deny adjustments to NV for PSPAs. See *Torrington Co. v. United States*, 82 F.3d 1039, 1048 (Fed. Cir. 1996) (dealing with pre-URAA law on PSPAs). However, subsection 1677m(e) specifically directs that Commerce shall not decline to consider an interested party's submitted information if that information is necessary to the determination but does not meet all of Commerce's established requirements, if the following criteria are met: (1) the information is submitted by the established deadline; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by Commerce; and (5) the information can be used without undue difficulties.

First, the Court approves of Commerce's change in policy, as it substitutes a rigid rule with a more reasonable method that nonetheless ensures that a respondent's information is reliable and verifiable. This is especially true in light of the more lenient statutory instructions of subsection 1677m(e). The Court further concludes that Commerce's decision to accept the PSPAs at issue is supported by substantial evidence and is fully in accordance with the post-URAA statutory language and the directions of the SAA. The record indicates that Commerce properly used its acquired knowledge of Koyo's computer systems and database to conclude that Koyo could not provide the information in the preferred form and, moreover, properly verified that Koyo's data was reliable. Commerce also properly accepted Koyo's allocation method, even though it included adjustments on scope and non-scope merchandise, as it carefully scrutinized the differences between such merchandise and ensured that it did not result in unreasonable distortions. Finally, while the Court acknowledges the potential for distorting reported per-unit adjustments on the sales involved in Commerce's analysis, the Court is convinced that Koyo cooperated to the best of its abilities in this case.

Consequently, the Court finds that Commerce's acceptance of Koyo's PSPAs as direct adjustments to NV is supported by substantial evidence and fully in accordance with law.

#### 4. Clerical Errors:

##### a. Commerce's Cost Test

Timken claims that Koyo made sales below cost that Commerce's computer program improperly did not exclude. Timken's Mem. Supp. Mot. J. Agency R. at 38-39. Commerce responds that it is immaterial that the computer program did not contain language to exclude below-cost sales because Commerce had already determined Koyo had made no such sales. Def.'s Partial Opp'n to Mot. J. Agency R. at 31-32 (citing to

*Koyo Margin Program*, P.R. Doc. No. 128, at 12-13, lns. 381-420, Timken's App., Ex. 10 (Feb. 1, 1997)).

Timken now agrees that the computer program properly excluded sales below cost and, therefore, abandons this claim. Timken's Reply Mem. Supp. Mot. J. Agency R. at 19.

**b. Model Matching Programming**

Timken contends that Commerce's computer program improperly matched U.S. sales to the next most similar home market model rather than to constructed value ("CV") where sales of the identical or most similar product in the home market were rejected because they were sold at prices below the cost of production ("COP"). Timken's Mem. Supp. Mot. J. Agency R. at 40-41.

Commerce acknowledges that an error exists in its programming language that causes certain U.S. sales to be matched with the second or third most-similar foreign like product in those instances where the identical or most similar foreign like product was determined to be below COP. Commerce, nevertheless, stated that a remand is not necessary because Commerce found that there were no below-cost sales with regard to Koyo. Def.'s Partial Opp'n to Mot. J. Agency R. at 33-34.

Koyo took no position on this issue in its opposition brief but thereafter argued that, pursuant to the CAFC's recent decision in *Cemex, S.A. v. United States*, 133 F.3d 897 (Fed. Cir. 1998), a remand would not be appropriate. Letter from Peter O. Suchman, Counsel to Koyo, to Raymond E. Burghardt, Clerk of the Court (Mar. 20, 1998). In particular, Koyo states that *Cemex* appears to lead to the conclusion that when home market sales of identical merchandise are found to be below cost, Commerce should attempt to base NV on sales of similar merchandise rather than automatically resorting to CV. *Id.* at 2.

At oral argument, Commerce stated that it will attempt to match models with the next most similar models in the U.S. instead of CV, as *Cemex* requires, and pointed to a recent determination in which it explained its change in practice. See *Brass Sheet and Strip From Canada: Final Results of Antidumping Duty Administrative Review and Notice of Intent Not To Revoke Order in Part*, 63 Fed. Reg. 33,037, 33,038 (June 17, 1998) (stating that Commerce would use CV as the basis for NV only when there are no above-cost sales that are otherwise suitable for comparison). However, Commerce now requests a remand to ensure that NV was calculated in accordance with *Cemex*.

The Court agrees with Koyo's interpretation of *Cemex*. In that case, the CAFC reversed Commerce's practice of matching a U.S. sale to CV when the identical or most similar home market model failed the cost test. 133 F.3d at 904. The Court stated that "[t]he plain language of the statute requires Commerce to base [FMV] on nonidentical but similar merchandise \* \* \* rather than [CV] when sales of identical merchandise have been found to be outside the ordinary course of trade." *Id.* As the URAA amended the definition of sales that are "outside the ordinary course of trade" to include sales at prices that are below cost, see 19

U.S.C. § 1677(15), if identical merchandise is found to be below cost, it is also outside the ordinary course of trade. Therefore, Commerce's computer program, albeit inadvertently, properly causes certain U.S. sales to be matched with the second or third most-similar foreign like product in those instances where the identical or most similar foreign like product was determined to be below COP, as mandated by *Cemex*. Nevertheless, this issue is remanded to Commerce to ensure that no models are erroneously matched to CV.

*c. Setting of Certain Diameters in the Computer Program*

Timken alleges that instructions in Commerce's computer program for Koyo's margin set the home market TRB cup inner diameter and home market TRB cone outer diameter to zero before they were matched with U.S. models, but did not contain any instructions setting the same dimensions for U.S. models to zero. Timken's Mem. Supp. Mot. J. Agency R. at 39-40.

Commerce explains that Koyo sold individual TRB cups and cones in the U.S. market, as opposed to TRB sets. In the past, Commerce did not split U.S. sets into individual cup and cone sales and, therefore, it was not necessary to set the dimensions at issue to zero. However, as a result of Commerce's home market set-splitting methodology, through which Commerce derives separate cup and cone sales from the respondent's reported home market TRB set sales, it is now necessary to purposely set the inner diameter for split cups and the outer diameter for split cones to zero. Hence, Commerce consents to a remand, noting that, if Koyo incorrectly reported an inner diameter value for any U.S. cups, or an outer diameter for any U.S. cones, that was greater than zero, the computer program would result in inaccurate model matching. Def.'s Partial Opp'n to Mot. J. Agency R. at 32-33.

Upon review of the record, the Court concludes that Commerce's computer program indeed failed to include language setting TRB cup inner diameter and TRB cone outer diameter dimensions to zero for U.S. model sales. *See Koyo Margin Program*, P.R. Doc. No. 128, at 11, lines 342-46. Consequently, the Court remands to Commerce to determine the extent to which Koyo reported any positive values for inside cup diameters and outside cone diameters in its sales of U.S. cups and cones and to correct the computer program by setting the value of any such positive diameters to zero in Koyo's U.S. summary sales database.

#### CONCLUSION

In accordance with the foregoing opinion, this case is remanded to Commerce to: (1) determine the extent to which Koyo reported any positive values for inside cup diameters and outside cone diameters in its sales of U.S. cups and cones and to correct the computer program by setting the value of any such positive diameters to zero in Koyo's U.S. summary sales database; and (2) ensure that no models are erroneously matched to CV in accordance with *Cemex*. Commerce is sustained as to all other issues.

(Slip Op. 98-93)

ASOCIACION COLOMBIANA DE EXPORTADORES DE FLORES, ET AL., PLAINTIFFS  
v. UNITED STATES, DEFENDANT, AND FLORAL TRADE COUNCIL, DEFENDANT-  
INTERVENOR

Consolidated Court No. 96-09-02209

[Plaintiff's motion for reconsideration of judgment denied.]

(Decided July 2, 1998)

*Akin, Gump, Strauss, Hauer & Feld, L.L.P. (Patrick F.J. Macrory)* for Plaintiff Equiflor Corporation.

*Frank W. Hunger*, Assistant Attorney General of the United States; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Velta A. Melbencis*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; Of Counsel, *Lucius B. Lau*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, for Defendant; *Karen L. Band*, Attorney-Advisor, Office of the Chief Counsel for Import Administration, Department of Commerce, for Defendant.

*Stewart and Stewart, (Mara Burr, James R. Cannon, Jr., Terence P. Stewart)* for Defendant-Intervenor Floral Trade Council.

#### MEMORANDUM OPINION AND ORDER

*POGUE, Judge:* On April 22, 1998, pursuant to U.S. CIT Rule 59(a), Plaintiff, Equiflor Corporation ("Equiflor"), filed a motion for reconsideration of the Court's judgment in *Asociacion Colombiana de Exportadores de Flores v. United States*, 22 CIT \_\_\_\_, slip op. 98-33 (Mar. 25, 1998) ("Asociacion Colombiana"). Plaintiff argues that in *Asociacion Colombiana* the Court overlooked the critical argument presented by Equiflor that a company whose assets have been sold and that was dissolved is not capable in law or in fact of receiving delivery of an anti-dumping questionnaire. Equiflor Mem. P. & A. Supp. Mot. Recons. at 4 ("Equiflor Mot.").

#### BACKGROUND

The background to this case is set forth in the Court's prior opinion. There, the Court sustained the application by the Department of Commerce ("Commerce") of the first-tier 76.60 percent best information available ("BIA") rate to the flower grower El Majui ("Majui") because of the company's failure to respond to the Department's questionnaire. *Asociacion Colombiana*, 22 CIT at \_\_\_\_, slip op. 98-33, at 49-51. Thereby, the Court denied the motion for judgment on the agency record filed by Equiflor, the importer of Majui's flowers. *Id.*

#### DISCUSSION

A motion for reconsideration under U.S. CIT Rule 59 is within the sound discretion of the court. *St. Paul Fire & Marine Ins. Co. v. United States*, 16 CIT 984, 984, 807 F. Supp. 792, 793 (1992), *aff'd*, 16 F.3d 420 (Fed. Cir. 1993); *Sharp Elecs. Corp. v. United States*, 14 CIT 1, 2, 729 F.

Supp. 1354, 1355 (1990). The purpose of a rehearing is not to relitigate the case but, rather, to rectify a fundamental or significant flaw in the original proceeding. *Arthur J. Humphrey's, Inc. v. United States*, 15 CIT 427, 427, 771 F. Supp. 1239, 1241 (1991), *aff'd and adopted*, 973 F.2d 1554 (Fed. Cir. 1992). If the moving party fails to "establish that there was a fundamental or significant flaw in the conduct of the original proceedings," this will result in the motion being denied. *Brookside Veneers, Ltd. v. United States*, 11 CIT 197, 199, 661 F. Supp. 620, 622 (1987), *rev'd on other grounds*, 6 Fed. Cir. (T) 121, 847 F.2d 786, *cert. denied*, 488 U.S. 943 (1988).

Equiflor claims that the Court overlooked the critical issue in finding that Majui received service of Commerce's questionnaire because the company had gone out of business prior to the questionnaire being sent out. Equiflor supports its contention by (1) citing to *Title Co. v. Wilcox Bldg. Corp.*, 302 U.S. 120, 124-25 (1937)(noting that the dissolution of a corporation puts an end to its existence, the result of which may be likened to the death of a natural person), and (2) alleging that, under Colombian law, commercial entities lose all legal status upon dissolution and liquidation and are therefore incapable of receiving service of documents, and can only be the subject of legal proceedings that were initiated prior to the act of dissolution. Equiflor Mot. at 4.

The issue in *Title Co.* was whether a dissolved corporation itself could initiate legal proceedings after the two year post-dissolution period provided by Illinois law. 302 U.S. at 123-27. In contrast, here the administrative review was initiated by Commerce against the company eight months after it was dissolved. The *Title Co.* court expressed no opinion as to whether proceedings could be instituted against a dissolved corporation. *Id.* Thus, *Title Co.* is inapposite.

Equiflor's citations to the Colombian law are also not persuasive.<sup>1</sup> The fact that Majui had "legally dissolved" under Colombian law is not dispositive with respect to Commerce's determination that the company received the questionnaire.<sup>2</sup> Rather, the question presented is whether Commerce's conclusion that Majui received its questionnaire and subsequent application of BIA to the company was supported by substantial evidence.

When examining Commerce's factual determinations to decide whether they are supported by substantial evidence, the court must determine whether the record contains "such relevant evidence as a reasonable mind might accept as adequate to support [Commerce's] conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951)(quoted in *Matsushita Elec. Indus. Co. Ltd. v. United States*, 3 Fed. Cir. (T) 44, 51, 750

<sup>1</sup> Specifically, Equiflor notes that under Colombian law, commercial entities such as Majui lose all legal status upon dissolution and liquidation, and are therefore incapable of receiving service of documents. Equiflor Mot. at 4 (citing Commercial Code of Colombia, Article 222.) Equiflor also points out that the Colombian Council of State has held that a corporation that has been liquidated can only be the subject of legal proceedings that were initiated prior to the act of dissolution. Equiflor Mot. at 4 (citing Council of State Opinion 3769 (Feb. 19, 1993)).

<sup>2</sup> Even if a corporation is dissolved, it will generally wind down its business.

F.2d 927, 933 (1984). Substantial evidence "is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Maritime Comm'n*, 383 U.S. 607, 620 (1966)(citations omitted).

Section 776(c) of the Tariff Act of 1930, as amended 19 U.S.C. § 1677e(c)(1988), states that Commerce "shall, whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation, use the best information otherwise available." Under Commerce's regulations, BIA is used whenever the Department (1) Does not receive a complete, accurate, and timely response to Commerce's request for factual information; or (2) Is unable to verify, within the time specified, the accuracy and completeness of the factual information submitted. 19 C.F.R. § 353.37(a).

In *Allied-Signal Aerospace Co. v. United States*, 996 F.2d 1185, 1190 (Fed. Cir. 1993), the Federal Circuit approved a BIA scheme in which Commerce selects first-tier BIA when a respondent refuses to cooperate with its requests for information or significantly impedes the administrative review, and second-tier BIA, which is less adverse, when a respondent substantially cooperates but still fails to provide requested information in a timely manner or in the required form. *Id.* at 1190-91.

In the final results, Commerce stated that Majui had not provided evidence that the Department's service of its questionnaire was defective. *Certain Fresh Cut Flowers From Colombia*, 61 Fed. Reg. 42,833, 42,862 (Dep't Commerce 1996)(final results admin. reviews). If Commerce found service to be defective then it would have applied the "all others" 3.10 percent rate to the company. By way of example, Commerce explained that it applied the "all others" rate to another flower grower, My Flowers, because the company provided evidence that service was defective. *Id.* Specifically, My Flowers maintained that the address to which the Department sent materials was out of date. In support of this argument, My Flowers provided registration certificates from the Colombian Chamber of Commerce, authenticated by the U.S. Embassy and the Ministry of Foreign Relations. *Id.* My Flowers also claimed that the company at its old address received the questionnaire, but failed to let My Flowers know of its arrival. My Flowers submitted documentation supporting that the individual who signed the delivery record for the questionnaire was not a My Flowers employee. *Id.*

Equiflor argues that service of Commerce's questionnaire to Majui was defective. To support this argument, Equiflor claims that the courier that had allegedly delivered the questionnaires to a number of flower growers, including Majui, was unable to supply proof of delivery when requested to do so. Equiflor Mot. at 2, n.4. However, the courier letter dated July 19, 1995, from TNT Skypack International Express to the respondent's law firm explains the circumstances: because TNT had

changed local agents, it could not obtain copies of original receipt signatures for its May 1994 deliveries. Equiflor Mot. Ex. A. Subsequently, Commerce also sent a copy of the questionnaire via Federal Express in August, 1994. Equiflor Mot. Ex. B. The second delivery was acknowledged with the signature of an individual, Maria Christina Vargas. *Id.* Equiflor argues that Ms. Vargas could not have been employed by Majui, since the company had ceased to exist one year earlier. Equiflor Mot. at 3. However, Equiflor provides no evidence to support this assertion.

In this case Commerce investigated over three hundred producers and/or exporters of the subject merchandise. *Certain Fresh Cut Flowers From Colombia*, 60 Fed. Reg. 30,270 (Dep't Commerce 1990)(prelim. results admin. reviews). Pursuant to the Department's usual practice Commerce forwarded its questionnaire to the respondents under investigation to the address listed for each company.<sup>3</sup> Many of these were small family-owned companies. See e.g., Pls.' Equiflor & Espirit Miami Mem. Supp. Mot. J. Agency R. at 3-5 (noting that Sunset Farms, owned by a husband and wife, operated a single farm, and sold flowers produced by a smaller farm, El Paico, owned by their daughter). A number of firms were dissolved or sold during the period of investigation. See e.g., Eden's Mem. Sup. Mot. J. Agency R. at 3-4 (stating that in May 1994, the shareholders of Groex, S.A. resolved to liquidate the company); Pls.' Equiflor & Espirit Miami Mem. Sup. Mot. J. Agency R. at 3-5 (noting that in March 1993, the family owning Sunset Farms decided to leave the flower business and sold the main farm to Flores El Roble); 61 Fed. Reg. at 42,836 (stating that Agricola de los Alisos, Colflores, Flores Estrella, Flores Mountgar, and Flor Colombia S.A. were no longer in business).

Under these circumstances, where a questionnaire is acknowledged and accepted for delivery twice, Commerce may reasonably conclude that the receiver will either respond or direct the questionnaire to the appropriate party. The burden is then on the respondent to provide evidence that service was defective. See *Williams v. Administrator of NASA*, 59 C.C.P.A. 1329, 463 F.2d 1391, 1400 (C.C.P.A. 1972)(“[W]here a party is in a position to have peculiar knowledge of the facts with regard to an issue, the burden of proof as to that issue lies upon that party.”)(citing McCormick, Evidence, § 337 (2d ed. 1972)), cert. denied, 412 U.S. 950 (1973). This rule is particularly appropriate in this case because of the administrative burden that Commerce faced. Moreover, any other policy would allow respondents to avoid answering Commerce's questionnaires by simply rearranging or reorganizing companies in order to evade service. As Commerce explained in the final results, “failure to apply a non-cooperative BIA rate to Flores el Majui would reward non-

<sup>3</sup>Commerce's regulations require the Department to examine “normally \* \* \* not less than 60 percent of the dollar value or volume of the merchandise” sold during a period of investigation. 19 CFR 353.42(b)(1). To determine which companies in a given country are responsible for these sales, Commerce requests certain commercial information from the appropriate U.S. embassy. ITA *Antidumping Manual*, Ch. 4, at 7 (Rev. 6/93). Since most respondent companies are represented by legal counsel, presentation of the Department's questionnaire is often made to attorneys at the Department of Commerce offices. If the respondent is not represented, the questionnaire is delivered via mail or international air express. *Id.* at 10.

compliance with our administrative review and would encourage other firms to liquidate themselves and reincorporate under new names." 61 Fed. Reg. at 42,862.

In conclusion, there is no record evidence to suggest that either the first or second deliveries were unreliable. Thus, the Court did not "overlook" any evidence in assessing whether substantial evidence supported Commerce's determination. Accordingly, the Court denies Equiflor's motion for reconsideration.

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(Slip Op. 98-94)

BLAKLEY CORP., PLAINTIFF v. UNITED STATES, DEFENDANT

Consolidated Court No. 92-10-00670

Plaintiff moves for summary judgment pursuant to U.S. CIT R. 56, contending the United States Customs Service (Customs) improperly classified certain artificial stone floor and wall components imported by the plaintiff. Plaintiff contends Customs should have classified and liquidated the merchandise at issue under subheading 6810.19.50 of the Harmonized Tariff Schedule of the United States (HTSUS), dutiable at 4.9% *ad valorem*. Plaintiff request this Court order Customs to reliquidate the protested entries under subheading 6810.19.50, HTSUS, and refund all excess duties plus interest as provided by law.

Defendant opposes plaintiff's Motion for Summary Judgment and has filed a Cross-Motion for Summary Judgment asserting Customs properly classified the merchandise at issue under subheading 6810.19.10, HTSUS, dutiable at 21% *ad valorem*.

*Held:* The Court finds Customs properly classified the merchandise at issue under subheading 6810.19.10, HTSUS, dutiable at 21% *ad valorem*. Accordingly, plaintiff's Motion for Summary Judgment is denied, and defendant's Cross-Motion for Summary Judgment is granted.

(Dated July 2, 1998)

*Neville, Peterson & Williams (John M. Peterson and George W. Thompson), New York, NY, for plaintiff.*

*Frank W. Hunger, Assistant Attorney General of the United States; Joseph I. Liebman, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (John J. Mahon); Chi S. Choy, Office of Assistant Chief Counsel, International Trade Litigation, United States Customs Service, of counsel, for defendant.*

#### OPINION

*CARMAN, Chief Judge:* This matter is before the Court on cross-motions for summary judgment pursuant to U.S. CIT R. 56. In its Motion for Summary Judgment, plaintiff asserts Customs should have classified and liquidated certain artificial stone floor and wall components imported by plaintiff under subheading 6810.19.50, HTSUS, dutiable at 4.9% *ad valorem*. Plaintiff requests this Court order Customs to reliquidate the protested entries under subheading 6810.19.50, HTSUS, and refund all excess duties plus interest as provided by law. Defendant

counters Customs properly classified the merchandise at issue under subheading 6810.19.10, HTSUS, dutiable at 21% *ad valorem*.

This Court has jurisdiction to review this matter pursuant to 28 U.S.C. § 1581(a) (1994). For the reasons which follow, the Court denies plaintiff's Motion for Summary Judgment and grants defendant's Cross-Motion for Summary Judgment.

#### BACKGROUND

This matter involves the proper classification of artificial stone floor and wall components which plaintiff imported from Italy. The components are manufactured by agglomerating chips and dust of natural stones in a cement binder. The mixture is then cut into squares and the top surface is polished. The sides of the merchandise are not rounded or beveled, but rather retain a rough edge to facilitate its installation as tiling or veneer. The finished product is in the shape of a square, approximately twelve inches per side, with a thickness of either 1.2 or 2 centimeters (cm). The merchandise is intended for use as indoor flooring and in certain instances may be used for wall covering or bordering material.

At issue are four entries imported into the United States between August 31 and November 17, 1989. Upon entry Customs classified the merchandise at issue under subheading 6810.19.10, HTSUS, as "Articles of cement, of concrete or of artificial stone, whether or not reinforced: Tiles, flagstones, bricks and similar articles: Other: Floor and wall tiles", dutiable at 21% *ad valorem*. The four entries at issue were liquidated between January 12 and March 16, 1990, under subheading 6810.19.10, HTSUS. Plaintiff filed protests on March 19 and April 30, 1990, contending the merchandise is classified properly as "slabs" under subheading 6810.19.50, HTSUS, providing for "other" articles of cement, of concrete or of artificial stone, whether or not reinforced: tiles, flagstones, bricks and similar articles, dutiable at 4.9% *ad valorem*. Customs denied plaintiff's protests on September 10 and December 30, 1992, respectively. Plaintiff filed two actions contesting Customs denial of its protests, and these two actions were consolidated by an order of the Court issued on April 7, 1997.

#### STATUTORY PROVISIONS AT ISSUE<sup>1</sup>

The parties agree the merchandise at issue is classified properly within Heading 6810 of the HTSUS,<sup>2</sup> but dispute the appropriate subheading. Plaintiff contends the merchandise should be classified under heading 6810.19.50, HTSUS, while defendant asserts Customs properly

<sup>1</sup> The HTSUS provisions cited by the Court appear in HTSUS (1<sup>st</sup> ed. 1987 and Supp. I - IV).

<sup>2</sup> See Br. in Supp. of Pl.'s Mot. for Summ. J. (Pl.'s Br.) at 31 ("It is undisputed that the imported building components involved in this action are appropriately classified within HTSUS heading 6810.19, as artificial stone articles."); Def.'s Br. in Supp. of Cross-Mot. For Summ. J. and in Opp'n to Pl.'s Mot. for Summ. J. (Def.'s Br.) at 6 ("The parties agree that the merchandise at issue is comprised of artificial stone and is classifiable under heading 6810, HTSUS.").

classified the merchandise at issue under heading 6810.19.10, HTSUS. The statute, in relevant part, provides:

6810	Articles of cement, of concrete or of artificial stone, whether or not reinforced:	
	Tiles, flagstones, bricks and similar articles:	
6810.11.00	Building blocks and bricks	4.9%
6810.19	Other:	
6810.19.10	Floor and wall tiles	21%
6810.19.50	Other	4.9%

Additionally, the parties have different positions regarding the applicability of Additional U.S. Notes 1 and 2 to Chapter 68 of the HTSUS (Note 1 and Note 2). The relevant Additional U.S. Notes to Chapter 68 of the HTSUS provide:

1. For the purposes of heading 6802, the term "slabs" embraces flat stone pieces, not over 5.1 cm in thickness, having a facial area of 25.8 cm<sup>2</sup> or more, the edges of which have not been beveled, rounded or otherwise processed except such processing as may be needed to facilitate installation as tiling or veneering in building construction.
2. For the purposes of heading 6810, the term "tiles" does not include any article 3.2 cm or more in thickness.

#### CONTENTIONS OF THE PARTIES

##### A. Plaintiff

Plaintiff raises two principal arguments in support of its contention that the merchandise at issue is classified properly under subheading 6810.19.50, HTSUS. First, plaintiff asserts Additional U.S. Notes 1 and 2 to Chapter 68, HTSUS, establish specific and distinct definitions of the statutory terms "slabs" and "tiles", respectively, making reference to the common and commercial meaning of those terms inappropriate. Plaintiff maintains the merchandise at issue falls only with the specific definition of "slabs" contained in Note 1. According to the plaintiff, the language of Note 1 defines "slab" by reference to "maximum thickness and minimum cubic facial [surface] area dimensions. An article that falls within HTSUS heading 6802 and that meets or exceeds these minimum size requirements and the other restrictions set forth in the Note can only be considered a slab; it cannot be considered a tile." (Br. in Supp. of Pl.'s Mot. for Summ J. (Pl.'s Br.) at 11.) Plaintiff also argues "[t]here is no question that, for purposes of HTSUS heading 6802, 'slabs', on the one hand, and 'tiles' and other articles, on the other hand, have been defined by Congress in a mutually exclusive manner." (*Id.* at 15.) According to the plaintiff, because "slabs" and "tiles" are defined as mutually exclusive articles and because the merchandise at issue is classified properly as "slabs", the subject merchandise cannot properly be classified as "tiles" under heading 6810.19.10, HTSUS, but rather must be classified under the "other" category in heading 6810.19.50, HTSUS.

Plaintiff's second principal argument contends the definition of "slabs" contained in Note 1 is relevant in determining the proper classi-

fication of goods throughout Chapter 68 in its entirety. Plaintiff argues although Note 1 specifically defines the term "slabs" "[f]or the purposes of HTSUS heading 6802", this limitation should be disregarded, and the definition of "slabs" contained in Note 1 "should be applied with respect to all merchandise classified under Chapter 68 of the HTSUS." (*Id.* at 5.)

#### B. Defendant

Defendant challenges the arguments made by plaintiff, contends Customs properly classified the merchandise at issue under heading 6810.19.10, HTSUS, and asserts this Court should sustain Customs' classification decision. Defendant first argues Note 1, by its own terms, is inapplicable in determining the proper classification of merchandise within heading 6810, HTSUS. The defendant's brief notes "[t]he language [in Note 1] specifically states that the note applies only to heading 6802, HTSUS: 'For the purposes of heading 6802 \* \* \*.'" (Def.'s Br. in Supp. of Cross-Mot. For Summ J. and in Opp'n to Pl.'s Mot. for Summ. J. (Def.'s Br.) at 6-7 (emphasis omitted).) Therefore, defendant argues, the description of "slabs" properly classifiable under heading 6802, HTSUS, contained in Note 1 is not relevant to determining the proper classification of the merchandise at issue under heading 6810, HTSUS.

Alternatively, defendant argues even if the description of "slabs" in Note 1 is applicable to heading 6810, HTSUS, and the merchandise at issue falls within the statutory description of "slabs", Customs still properly classified the merchandise as "tiles" under subheading 6810.19.10, HTSUS. Defendant asserts that while "[t]he term 'slab' is not a synonym for the term 'tile,' \* \* \* certain types of floor and wall 'tiles' are 'slabs.' The statutory language does not distinguish 'slabs' from 'tiles' as mutually exclusive articles." (*Id.* at 10.) With respect to the merchandise at issue in this matter, defendant contends "even if [they] meet the conditions for 'slabs' set forth in Additional U.S. Note 1 to Chapter 68, HTSUS, \* \* \* these 'slabs' \* \* \* are 'tiles' properly classifiable as 'tiles' in subheading 6810.19.10, HTSUS." (*Id.*)

Finally, defendant points to an inconsistency resulting from plaintiff's interpretation of the statute. Defendant notes that in contrast to plaintiff's argument that Note 1 requires articles with a surface area greater than 25.8 cm<sup>2</sup> be classified as "slabs" throughout the entire HTSUS, another provision within heading 6802, HTSUS, classifies articles with a surface area of 49 cm<sup>2</sup> as "[t]iles". Thus, defendant asserts, plaintiff's position yields inconsistent results that this Court's precedent directs it to avoid. (See Def.'s Br. at 24 (citing *Intercontinental Fibres, Inc. v. United States*, 64 C.C.P.A. 31, 33, C.A.D. 1179, 545 F.2d 744, 746 (1976) (stating "[u]nless it be shown that a literal construction leads to an anomaly or is contrary to Congressional intent, \* \* \* the statutory language must govern") (citation omitted); *Cohn & Rosenberger v. United States*, 4 Ct. Cust. 378, 383, T.D. 33536 (1913) (noting "in the presence of ambiguity, the fact that inconsistent or absurd results may flow from one construction and not from another will often lead the

court to adopt the latter as most likely expressing the legislative intent").

#### STANDARD OF REVIEW

This case is before the Court on cross-motions for summary judgment. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." U.S. CIT R. 56(d). "The Court will deny summary judgment if the parties present a dispute about a fact such that a reasonable trier of fact could return a verdict against the movant." *Ugg Int'l, Inc. v. United States*, 17 CIT 79, 83, 813 F. Supp. 848, 852 (1993) (quotation and citation omitted). When appropriate, summary judgment is a favored procedural device to "secure the just, speedy, and inexpensive determination" of an action. *Sweats Fashions, Inc. v. Pannill Knitting Co., Inc.*, 833 F.2d 1560, 1562 (Fed. Cir. 1987) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S. Ct. 2548, 2555, 91 L. Ed. 2d 265 (1986)) (internal quotations omitted). While the statute provides Customs decisions are entitled to a presumption of correctness, *see* 28 U.S.C. § 2639(a)(1) (1994), where, as here, a question of law is before the Court on a motion for summary judgment, the statutory presumption of correctness is irrelevant. *See Universal Electronics Inc. v. United States*, 112 F.3d 488, 492 (Fed. Cir. 1997) ("[W]e conclude that although the presumption of correctness applies to the ultimate classification decision, \* \* \* the presumption carries no force as to questions of law.") (footnote omitted); *Rollerblade, Inc. v. United States*, 112 F.3d 481, 484 (Fed. Cir. 1997) ("[N]o deference attaches to Customs' classification decisions either under 28 U.S.C. § 2639 or under *Chevron*, where there are no disputed issues of material fact."); *Goodman Manufacturing, L.P. v. United States*, 69 F.3d 505, 508 (Fed. Cir. 1995) ("Because there was no factual dispute between the parties, the presumption of correctness is not relevant."). The parties agree, and the Court finds, there are no genuine issues of material fact in dispute in this matter. Thus, the statutory presumption of correctness does not apply in this matter.

#### DISCUSSION

Because plaintiff's second argument is central to the disposition of this matter, the Court will first determine whether the definition of "slabs" in Note 1 applies to all headings in Chapter 68. Plaintiff contends longstanding principles of statutory construction require this Court to apply the descriptive characteristics of "slabs" in Note 1 throughout the entirety of Chapter 68, HTSUS. In support of its argument, plaintiff cites the decisions in *United States v. A.W. Faber, Inc.*, 16 Ct. Cust. 467, 470, T.D. 43211 (1929), and *Productol Chemical Co. v. United States*, 74 Cust. Ct. 138 (1975), arguing those cases support the proposition that the definition of a tariff term applies throughout the Chapter for which it is supplied. (See Pl.'s Br. at 26.)

The Court is not persuaded by plaintiff's arguments that the description of the term "slab" contained in Note 1 applies throughout Chapter 68, HTSUS, and is not persuaded that the decisions cited by plaintiff provide authority supporting its argument. Plaintiff correctly notes the decision in *A.W. Faber, Inc.* supports the proposition that distinctions drawn between two products in one part of a statute "should be carried into other parts of the act unless a legislative intent to the contrary is evidenced." (Pl.'s Br. at 26 (quoting *A.W. Faber, Inc.*, 16 Ct. Cust. at 470).) In making this argument, however, plaintiff fails to give sufficient weight to the caveat that distinctions drawn between two products should not be applied throughout the statute where a contrary legislative intent is apparent. The same shortcoming is present with respect to plaintiff's citation of *Productol Chemical Co.* for the proposition that a word or phrase is presumed to have the same meaning throughout the statute, unless a contrary intent is clearly indicated.

The fundamental difference between this matter and the cases cited by the plaintiff is that Congress did specifically express its intent to limit the applicability of Notes 1 and 2. Congress included language in Notes 1 and 2 which makes clear the descriptions they contain apply only to certain headings within the HTSUS. Note 1 clearly states its description of "slabs" applies only with respect to heading 6802, HTSUS, while Note 2 makes clear its description of "tiles" applies only with respect to heading 6810, HTSUS. In order for the Court to accept plaintiff's contention that the description of "slabs" in Note 1 applies throughout Chapter 68, HTSUS, the Court would be required to disregard language which clearly establishes boundaries on the applicability of the descriptions of "slabs" in Note 1.

Congress' intent to limit the descriptions contained in Notes 1 and 2 could scarcely be made more clear. As noted above, introductory clauses to both Notes 1 and 2 clearly limit the scope of their application to headings 6802 and 6810, respectively. The Court is mindful of plaintiff's statement that in interpreting a statute "the entire context of the statute must be considered and every effort made to give effect to every word therein; Congress is presumed not to have used superfluous words in a statute." (Pl.'s Br. at 14.) Based on plaintiff's acknowledgment of this concept, the Court has difficulty understanding how plaintiff can assert "there is no reason-and certainly no clearly expressed Congressional intent-why th[e] definition[ ] [in Note 1] should not apply with equal force to HTSUS heading 6810." (*Id.* at 27.) The Court finds the language utilized in Notes 1 and 2 clearly and decisively expresses a Congressional intent the descriptions contained therein be applied only with respect to headings 6802 and 6810, respectively.

Even if the Court were to find Note 1 applies throughout Chapter 68, HTSUS, as plaintiff contends, the most that would be established is that the merchandise at issue falls within both the description of "slabs" contained in Note 1 and the description of "tiles" contained in Note 2. The merchandise at issue falls within the description of "slabs" in Note 1 be-

cause it is less than 5.1 cm thick, has a surface area larger than 25.8 cm<sup>2</sup>, and meets the finishing requirements specified. Plaintiff's argument, however, fails to appreciate the merchandise at issue also falls within the description of "tiles" contained in Note 2. The merchandise at issue is less than 3.1 cm thick, and thus satisfies the only characteristic of "tiles" specified by Note 2.<sup>3</sup>

Finally, plaintiff argues the descriptions of "slabs" and "tiles" in Notes 1 and 2, respectively, constitute "statutory definitions" making reference to the common and commercial meaning of "slabs" and "tiles" improper. While Notes 1 and 2 certainly establish boundaries on the dimensional measurements of "slabs" and "tiles" properly classifiable within headings 6802 and 6810, respectively, the Court rejects plaintiff's contention that these "statutory definitions" render the common and commercial meanings irrelevant. The Court finds Notes 1 and 2 do not provide "definitions" of the terms "slabs" and "tiles", but rather provide a description of measurements and the manner in which the underlying articles are finished (e.g., with edges that are not rounded or beveled). The Court agrees with the defendant's characterization that "the Additional U.S. Notes to Chapter 68, HTSUS, simply set a minimum facial area for 'slabs' and a maximum thickness for 'tiles' for purposes of specified parts of the tariff schedule." (Def.'s Br. at 13.) The Court finds the common and commercial meaning is relevant to clarify the merchandise falling within the various headings, and the dimensional measurements in the Notes set boundaries on the sizes which can be classified within the various headings of Chapter 68. The definitions of "slabs" and "tiles" in the Notes only reference dimensional measurements of the merchandise and make no effort to further describe the merchandise or define the terms used in the statute.

Having rejected plaintiff's contention the subject merchandise is classified properly as "slabs" based on the application of Note 1 to merchandise which the parties agree is classifiable under heading 6810, HTSUS, and that Notes 1 and 2 do not constitute "statutory definitions" of the terms "slabs" and "tiles", the Court must determine whether Customs properly classified the merchandise at issue under heading 6810.19.10, HTSUS. General Rule of Interpretation 6 provides "[f]or legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes." It is well-settled that "[t]he ultimate issue as to whether particular merchandise has been classified under an appropriate tariff provision necessarily depends on the meaning of the terms of that provision." *Lynteq, Inc. v. United States*, 10 Fed.Cir. (T) 112, 115, 976 F.2d 693, 696 (1992). To determine the proper meaning of these tariff terms,

<sup>3</sup> While plaintiff argues reading Notes 1 and 2 *in pari materia* yields the conclusion that an article classifiable in Chapter 68, HTSUS, which is less than 5.1 cm thick and with a surface area greater than 25.8 cm<sup>2</sup> can be classified only as a "slab", the Court does not accept this reading. Heading 6802.10.00, providing for "tiles" with a maximum surface area of 49 cm<sup>2</sup>, is a clear example that articles may be classified as "tiles" even though their surface area exceeds the 25.8 cm<sup>2</sup> minimum surface area for "slabs" classifiable under heading 6802, HTSUS, as established in Note 1. As will be discussed below, the Court finds the fundamental distinguishing characteristic between "slabs" and "tiles" is thickness, not surface area, as plaintiff contends.

the Court will construe the terms "in accordance with their common and popular meaning, in the absence of contrary legislative intent." *Marubeni Am. Corp. v. United States*, 35 F.3d 530, 534 (1994) (quoting *E.M. Chems. v. United States*, 9 Fed.Cir. (T) 33, 37, 920 F.2d 910, 913 (1990) (citations omitted)). "To assist it in ascertaining the common meaning of a tariff term, the court may rely upon its own understanding of the terms used, and it may consult lexicographic and scientific authorities, dictionaries, and other reliable information sources." *Id.* (quoting *Brookside Veneers, Ltd. v. United States*, 6 Fed.Cir. (T) 121, 125, 847 F.2d 786, 789 (1988) (citation omitted)).

The term "slab" is defined as "a comparatively thick plate or slice of something (as of metal, stone, wood, or food)." *Webster's Third New International Dictionary* 2136 (1986). The same source defines "tile" as "a flat or curved piece of fired clay, stone, concrete, or other material used esp. for roofs, floors, or walls and often for such work of an ornamental nature." *Id.* at 2393. An alternate definition provides tiles are "a thin piece of resilient material (as an asphalt composition, cork, linoleum, or rubber) used esp. for covering floors or walls." *Id.*

The definitions of "slabs" and "tiles" suggest a fundamental difference between the two articles is thickness. This is reflected in comparing the maximum thickness for "slabs" and "tiles" provided for in Notes 1 and 2, respectively. Note 1 provides articles classifiable as "slabs" under heading 6802, HTSUS, may not be thicker than 5.1 cm, while Note 2 provides articles properly classifiable as "tiles" under heading 6810, HTSUS, may not be thicker than 3.1 cm. The Court finds the relative thickness of the merchandise at issue, rather than its surface area, is the fundamental characteristic relevant to its classification. Based on this distinction, and the fact that the merchandise at issue is significantly thinner than the maximum thickness for "tiles" established in Note 2, the Court finds Customs properly classified the merchandise at issue as "tiles" under heading 6810.19.10, HTSUS, dutiable at 21% *ad valorem*.

Finally, the Court notes the entry papers and product brochures concerning the merchandise at issue use the term "tile" in describing the product. While the Court acknowledges this description is not dispositive in determining the merchandise's proper classification,<sup>4</sup> such a description does provide further support for this Court's determination that Customs properly classified the merchandise at issue under sub-heading 6810.19.10, HTSUS, as "Articles of cement, of concrete or of artificial stone, whether or not reinforced: Tiles, flagstones, bricks and similar articles: Other: Floor and wall tiles".

<sup>4</sup> See, e.g., *North American Processing Co. v. United States*, Ct. No. 93-11-00769, slip op. 98-13 at 6 (CIT Feb. 19, 1998) ("While they are not controlling in classification determinations, invoice and packaging descriptions of merchandise are evidence which can aid the Court in reaching the proper classification."); *Schott Optical Glass, Inc. v. United States*, 11 CIT 899, 910, 678 F. Supp. 882, 892 ("The record is replete with evidence that demonstrates [the merchandise at issue] has been commonly and popularly known, advertised, described, purchased, and sold as optical glass."); *aff'd*, 862 F.2d 866 (Fed. Cir. 1988); *Lukas American, Inc. v. United States*, 7 CIT 280, 282 (1984) ("While not controlling, it is well established that the marketing of an imported article is relevant in determining the proper classification of that item for tariff purposes."); *Venair Shape Corp. v. United States*, 66 Cust. Ct. 469, 472, C.D. 4235 (1971) ("Although the manner in which an article is marketed is not, of itself, determinative of its classification, it does, of course, have obvious probative value.").

## CONCLUSION

For the reasons stated above, this Court finds the merchandise at issue is classified properly under subheading 6810.19.10, HTSUS, as "Articles of cement, of concrete or of artificial stone, whether or not reinforced: Tiles, flagstones, bricks and similar articles: Other: Floor and wall tiles", dutiable at 21% *ad valorem*. Accordingly, plaintiff's Motion for Summary Judgment is denied and defendant's Cross-Motion for Summary Judgment is granted.

## SCHEDULE OF CONSOLIDATED CASES

*Blakley Corporation v. United States* Court No. 93-01-00006

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(Slip Op. 98-95)

TOYOTA MOTOR SALES, U.S.A., INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND NACCO MATERIALS HANDLING GROUP, INC., INDEPENDENT LIFT TRUCK BUILDERS UNION, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, INTERNATIONAL UNION, ALLIED INDUSTRIAL WORKERS OF AMERICA (AFL-CIO), & UNITED SHOP AND SERVICE EMPLOYEES, DEFENDANT-INTERVENORS

Court No. 97-03-00415

Plaintiff moves for Judgment on the Agency Record pursuant to U.S. CIT R. 56.2 arguing the Department of Commerce's (Department or Commerce) determination in *Certain Internal-Combustion Forklift Trucks From Japan; Final Results of Antidumping Duty Administrative Review*, 62 Fed. Reg. 5,592 (Feb. 6, 1997) (*Final Results*) is not supported by substantial evidence on the record and is not otherwise in accordance with law. Plaintiff argues Commerce improperly resorted to facts otherwise available to value plaintiff's home market credit revenue. Plaintiff contends Commerce's decision to use facts otherwise available is not supported by substantial evidence on the record and is not otherwise in accordance with law and asks the Court to remand this issue and instruct Commerce to find plaintiff earned no home market credit revenue. Plaintiff additionally argues Commerce's rejection of verified direct and indirect selling expenses incurred by plaintiff in Japan is not supported by substantial evidence on the record and is not otherwise in accordance with law. Plaintiff asks the Court to remand this issue and direct Commerce to accept the verified direct and indirect selling expenses incurred by plaintiff in Japan. Finally, plaintiff argues Commerce's calculation of constructed export price profit is not supported by substantial evidence on the record and is not otherwise in accordance with law because it is based on the combined profits from sales of large and small forklift trucks, which plaintiff maintains are different foreign like products. Plaintiff requests the Court remand this issue and instruct Commerce to base its constructed export price (CEP) profit calculations solely on the prices and expenses of large forklift trucks, which plaintiff contends is the foreign like product in this case.

Defendant opposes plaintiff's motion and asks this Court to sustain Commerce's *Final Results*. Defendant contends Commerce properly resorted to adverse facts otherwise available, pursuant to 19 U.S.C. §§ 1677e(a) and (b), when it: (1). denied Toyota's claimed direct and indirect selling expenses as adjustments to normal value; (2), included Toyota's claimed selling expenses in the adjusted home-market price for purposes of constructed

value and the sales-below-cost test; and (3), used the claimed selling expense in calculating the constructed export price in the case of the claimed direct advertising expense incurred from United States sales. Defendant argues Commerce's approach constitutes a rational response to Toyota's failure to cooperate to the best of its ability. Defendant additionally contends Commerce properly applied the transaction-specific gross revenue earned by Toyota Motor Credit Corporation on relevant U.S. sales to the weighted-average home market price of matched sales. Defendant argues 19 U.S.C. § 1677e(b) allows Commerce to apply an adverse inference with respect to this issue. Defendant further maintains Commerce's determination to calculate a single CEP profit based upon all subject merchandise and foreign like product for forklift trucks is a reasonable interpretation of the statute, is supported by substantial evidence on the record and is otherwise in accordance with law.

Defendant-Intervenors also oppose plaintiff's Motion for Judgment on the Agency Record, arguing Commerce was required to apply facts otherwise available due to Toyota's failure at verification to provide documents to support claims made in its questionnaire responses. Defendant-Intervenors contend the Department reasonably determined that the statutory preference is a single CEP profit for all sales under consideration.

*Held:* Plaintiff's Motion for Judgment on the Agency Record is denied. The Court finds Commerce's *Final Results* are supported by substantial evidence on the record and are otherwise in accordance with law and sustains them in their entirety. This action is dismissed.

(Dated July 2, 1998)

*Dorsey & Whitney LLP (John B. Rehm, Munford Page Hall, II, L. Daniel Mullaney, Robert W. Bras), Washington, D.C., for plaintiff.*

*Frank W. Hunger, Assistant Attorney General of the United States; David M. Cohen, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (Lesleyanne Koch Kessler); Bernd Janzen, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.*

*Collier, Shannon, Rill & Scott, PLLC (Paul C. Rosenthal, Mary T. Staley), Washington, D.C., for defendant-intervenors.*

#### OPINION

*CARMAN, Chief Judge:* Before the Court is plaintiff's Motion for Judgment on the Agency Record pursuant to U.S. CIT R. 56.2. Plaintiff, Toyota Motor Sales, U.S.A., Inc., (Plaintiff" or "Toyota) argues the Department of Commerce's (Department or Commerce) determination in *Certain Internal-Combustion Forklift Trucks From Japan; Final Results of Antidumping Duty Administrative Review*, 62 Fed. Reg. 5,592 (Feb. 6, 1997) (*Final Results*) is not supported by substantial evidence on the record and is not otherwise in accordance with law. Plaintiff raises three issues in challenging the *Final Results*. First, plaintiff argues Commerce improperly utilized facts otherwise available, specifically Toyota's United States credit revenue, to value Toyota's home market credit revenues. Second, plaintiff contends Commerce's rejection of verified direct and indirect selling expenses incurred by plaintiff in Japan is not supported by substantial evidence on the record and is not otherwise in accordance with law. Finally, plaintiff asserts Commerce's calculation of constructed export price (CEP) profit is not supported by substantial evidence on the record and is not otherwise in accordance with law because it is based on the combined profits from sales of large and small forklift trucks, which plaintiff contends are different foreign like products.

In response, defendant argues Commerce's determination is supported by substantial evidence on the record and is otherwise in accordance with law. Defendant contends Commerce properly resorted to adverse facts otherwise available, pursuant to 19 U.S.C. §§ 1677e(a) and (b), when it: (1). denied Toyota's claimed direct and indirect selling expenses as adjustments to normal value; (2). included the claimed selling expenses in the adjusted home-market price for purposes of constructed value (CV) and the sales-below-cost test; and (3). used the claimed selling expense in calculating the CEP profit in the case of the claimed direct advertising expense incurred from United States sales. Defendant contends Commerce properly applied the transaction-specific gross revenue earned by Toyota Motor Credit Corporation on relevant U.S. sales to the weighted-average home market price of matched sales. Defendant further maintains Commerce properly calculated a single CEP profit based upon all subject merchandise and foreign like product for forklift trucks.

Defendant-Intervenors, NACCO Materials Handling Group, Inc., Independent Lift Truck Builders Union, International Association of Machinists and Aerospace Workers, International Union, Allied Industrial Workers of America (AFL-CIO), and the United Shop and Service Employees, (collectively NACCO) oppose plaintiff's Motion for Judgment on the Agency Record and support defendant's position. Defendant-Intervenors argue because Toyota was unable at verification to provide documents to support claims made in its questionnaire responses, Commerce was required to apply facts otherwise available with respect to the claims which could not be verified. Defendant-Intervenors contend the Department reasonably determined that the statutory preference is a single CEP profit for all sales under consideration.

This Court has jurisdiction under 28 U.S.C. § 1581(c) (1994), and for the reasons set forth below, denies plaintiff's Motion for Judgment on the Agency Record, sustains Commerce's *Final Results* in their entirety, and dismisses this action.

#### BACKGROUND

On June 7, 1988, Commerce issued an antidumping duty order on certain internal-combustion, industrial forklift trucks from Japan. *See Antidumping Duty Order and Amendment to Final Determination of Sales at Less Than Fair Value; Certain Internal-Combustion, Industrial Forklift Trucks From Japan*, 53 Fed. Reg. 20,882 (Dep't Comm. 1988). In June 1995, Commerce published a notice informing interested parties of their opportunity to request an administrative review of the antidumping duty order on forklift trucks from Japan. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 60 Fed. Reg. 29,821, 29,822 (Dep't Comm. 1995). On August 16, 1995, pursuant to a request from the domestic producers, Commerce published a notice of its initiation of the fourth administrative review of forklift trucks from Japan exported by Toyota Motor Corporation (TMC) and two other respondents for the

period June 1, 1994 to May 1, 1995. See *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 60 Fed. Reg. 42,500, 42,501 (Dep't Comm. 1995). The products covered by the review are "certain internal-combustion industrial forklift trucks, with lifting capacity of 2,000 to 15,000 pounds" and are further described as "[a]ssembled, not assembled, and less than complete, finished and not finished, operator-riding forklift trucks powered by gasoline, propane, or diesel fuel internal-combustion engines of off-the-highway types used in factories, warehouses, or transportation terminals for short-distance transport, towing, or handling of articles." *Final Results*, 62 Fed. Reg. at 5,592.

In conducting its investigation in the fourth administrative review, Commerce forwarded to Toyota an antidumping questionnaire on July 31, 1995 and included the following instruction:

If you fail to provide accurately the information requested within the time frame provided, the Department may be required to base its findings on the facts available. If you fail to cooperate with the Department by not acting to the best of your ability to comply with a request for information, the Department may use information that is adverse to your interest in conducting its analysis.

(July 31, 1996 Antidumping Questionnaire to Toyota, *reprinted in* Def.'s App. to Mem. in Opp'n to Pl.'s Mot. for J. Upon Agency R. (Def.'s App.) at 2.) On October 16, 1995, Toyota submitted its principal questionnaire response.

On April 19, 1996, Commerce sent Toyota a supplemental questionnaire, informing it that Commerce had identified several areas in its October 1995 response that required further information or clarification. First, Commerce attempted to confirm whether Toyota accurately reported its claimed selling expenses for home market advertising and certain indirect selling expenses. Second, the Department attempted to confirm Toyota's claim that its related financing company in Japan, Toyota Finance Corporation (TFC), was not involved in any aspect of forklift truck sales made in the home market. Commerce requested additional information with respect to Toyota's credit expenses and stated

Please explain the apparent discrepancy between your statement that TMC had no short-term borrowing during the [period of review (POR)] and your 1995 audited financial statements which indicate TMC did carry short-term debt. Please explain why you believe this does not constitute short-term borrowing for the POR. Please provide the equation you used to calculate credit expenses and a worksheet showing the calculation of your average short-term interest rate.

Is Toyota Finance Corporation (TFC) involved in any financing transactions between [Toyota Automatic Loomwork] or TMC and its affiliated and unaffiliated dealers? If so, please explain its involvement and the various programs available and utilized during the period of review.

(Letter from Laurie Parkhill, Office of Antidumping Compliance, to TMC of Apr. 19, 1996, *reprinted in* Def.'s App. at 25, 33.)

On May 1, 1996, Commerce informed Toyota of its intent to conduct verification of Toyota's factual submissions and forwarded a verification outline to Toyota, explaining that Commerce planned to examine certain source documents, including Toyota's financial statements covering the period of review. Commerce conducted on-site verification of Toyota's factual submissions and outlined eleven specific deficiencies, several of which are relevant to Toyota's challenges to the *Final Results*. For example, Commerce indicated Toyota was unable to provide documentation in support of some of its claimed indirect selling expenses and home market direct advertising expenses. Commerce explained

We could not verify TMC's indirect advertising and sales-promotion expenses and indirect selling expenses (wage & salary and general and administrative expenses). Therefore, we are denying them as adjustments to normal value. \* \* \*

We could not verify TMC's reported direct advertising expenses. Therefore, we are denying them as adjustments to normal value.  
\* \* \*

(Commerce's Preliminary Results Analysis Memorandum, dated July 26, 1996, *reprinted in* Def.'s App. at 52, 55.) Commerce also explained

Toyota could not go below the level of a semi-annual detail report to support certain of its claimed indirect selling expenses reported under its variable INDIRSH (Sales Promotion and Advertising, Wage & Salary and General Administrative).

Toyota could not go below the level of a semi-annual detail report to support its claimed home market direct advertising expense (ADVERTH).

(Commerce Verification Report, dated Aug. 12, 1996, *reprinted in* Def.'s App. at 56, 57.)

On August 2, 1996, Commerce published its preliminary results for the fourth administrative review. *See Certain Internal-Combustion Industrial Forklift Trucks From Japan; Preliminary Results of Antidumping Duty Administrative Review*, 61 Fed. Reg. 40,400 (Dep't Comm. 1996) (prelim. determ.) (*Preliminary Results*). In the *Preliminary Results*, Commerce denied Toyota's claimed indirect expenses (INDIRSH) and direct advertising expenses (ADVERTH) as downward adjustments to normal value finding them unverifiable, but included the claimed expenses in its calculations of constructed value and sales-below-cost test. The *Preliminary Results* also indicated Commerce "made an adjustment for an amount of profit allocated to [CEP] expenses in accordance with section 772(d)(3) of the Act [19 U.S.C. § 1677a(d)(3)]." *Preliminary Results*, 61 Fed. Reg. at 40,401. Toyota's challenges to the *Preliminary Results* are consistent with its present lawsuit.

Commerce published its final determination of the fourth annual antidumping duty administrative review without altering its findings

from the *Preliminary Results*. See *Final Results*, 62 Fed. Reg. at 5,592. Commerce explained it "determined that the use of facts available is appropriate for certain portions of [the] analysis of Toyota's data." *Id.* First, Commerce stated under 19 U.S.C. § 1677e(a)(1)(D), "the use of facts available for certain home market selling expenses and home market credit revenue is appropriate for Toyota because we were unable to verify the accuracy of the information Toyota submitted." *Id.* at 5,593. Second, Commerce explained that:

by not providing certain basic verification documents that were essential to the establishment of the accuracy of the data submitted (e.g., expense ledgers for certain selling expenses and an affiliated company's (Toyota Finance Corporation, "TFC") financial statements), Toyota did not cooperate to the best of its ability to comply with our requests for such information. Accordingly, our resort to an adverse inference with respect to these items is appropriate and fully in accord with law.

*Id.* at 5,593-94. Third, Commerce indicated it used as much of Toyota's submitted factual information as could be verified, and hence, maintains the final results were not overly punitive. Finally, Commerce explained the application of facts otherwise available is decided on a case-by-case basis, depending upon the circumstances of each investigation or administrative review, and that, in this case, "the information requests at issue were routine verification requests that in no way constituted an unreasonable burden on Toyota." *Id.* at 5,594.

#### CONTENTIONS OF THE PARTIES

##### A. Plaintiff

Plaintiff raises three issues in challenging the *Final Results*. First, plaintiff argues the Department's utilization of Toyota's United States credit revenue as facts otherwise available in determining Toyota's home market credit revenues is not supported by substantial evidence on the record and is not otherwise in accordance with law. Plaintiff additionally contends Commerce's deliberate use of adverse inferences, in response to Toyota's inability, despite its best efforts, to produce certain documents on short notice and within a short period of time is disproportionately punitive, is not supported by substantial evidence on the record, and is not otherwise in accordance with law. Plaintiff argues even if the Department were justified in imputing credit revenue to home market sales, the Department's addition of gross, instead of net, credit revenue is not supported by substantial evidence on the record and is not otherwise in accordance with law. Plaintiff maintains the Court should instruct the Department to find Toyota received no credit revenue on its home market sales.

Second, Plaintiff contends the Department's rejection of verified direct and indirect selling expenses incurred by TMC in Japan is not supported by substantial evidence on the record and is not otherwise in accordance with law. Plaintiff contends Commerce's manipulation of reported expenses to maximize the punitive effect as adverse facts other-

wise available, despite plaintiff's best efforts to obtain the documents requested by Commerce at verification, is disproportionately punitive, is not supported by substantial evidence on the record and is not otherwise in accordance with law. Plaintiff asks the Court to instruct Commerce to accept its claimed direct and indirect selling expenses incurred in Japan.

Finally, plaintiff argues Commerce's calculation of CEP profit based on the combined profits from sales of large and small forklift trucks is not supported by substantial evidence on the record and is not otherwise in accordance with law. Plaintiff requests the Court to instruct Commerce to base its CEP profit calculations solely on the prices and expenses of the large forklift trucks, which plaintiff contends are the foreign like product in this case.

#### B. Defendant

Defendant opposes plaintiff's motion and argues the *Final Results* should be sustained. Defendant contends "Toyota was unable to support some of its circumstances-of-sale adjustments with detailed source documentation at verification." (Def.'s Mem. in Opp'n to Pl.'s Mot. for J. Upon Agency R. (Def.'s Br.) at 13.) Defendant further contends "Toyota could have, but did not, provide the monthly breakdowns for these expenses, despite Toyota's knowledge that '[i]t is standard Department practice to review source documentation at a level of detail greater than a semi-annual report.'" (*Id.* at 14 (quoting *Final Results*, 62 Fed. Reg. at 5,595).) Defendant maintains Commerce properly utilized adverse facts otherwise available, pursuant to 19 U.S.C. §§ 1677e(a) and (b), when it: (1). denied Toyota's claimed direct and indirect selling expenses as adjustments to normal value; (2). included Toyota's claimed selling expenses in the adjusted home-market price for purposes of CV and the sales-below-cost test; and (3). used the claimed selling expense in calculating CEP profit in the case of the claimed direct advertising expense incurred from U.S. sales. Defendant argues "Commerce's approach, [sic] constitutes a rational response to Toyota's failure to cooperate to the best of its ability." (*Id.*)

Defendant additionally argues 19 U.S.C. § 1677e(a) allows Commerce to use facts otherwise available when it is unable to verify information provided by a respondent. Defendant maintains in this case

Toyota failed to provide verifiable information regarding the financing of its forklift sales in the home market. Even though Toyota had received sufficient notice that the Department would seek to verify Toyota's claim that TFC was not involved in forklift sales in the home market, Toyota did not, when requested, provide Commerce verifiers with TFC's financial statements. \*\*\* Toyota's failure precluded Commerce from ascertaining what, if any, financing arrangements Toyota had provided its domestic forklift customers during the POR. \*\*\* Commerce's adverse facts available deter-

mination is reasonable, supported by substantial evidence, and otherwise in accordance with law.

(*Id.* at 14-15.)

#### C. Defendant-Intervenors

Defendant-Intervenors oppose plaintiff's Motion for Judgment on the Agency Record and argue because Toyota was unable at verification to provide documents to support claims made in its questionnaire responses, documents that are typically provided during verification and that were identified as possible source documents in the Department's verification outline, Commerce was required to apply facts otherwise available with respect to the claims which could not be verified. Defendant-Intervenors further contend the Department indicated to Toyota in its verification outline that financial statements might be the type of document the Department would review at verification, and "Toyota's failure to provide this basic source document fully supports the Department's use of facts available." (Def.-Intvs.' Opp'n to Pl.'s Mot. for J. Upon Agency R. (Def.-Intvs.' Br.) at 12.) Defendant-Intervenors assert the Department properly found that Toyota failed to substantiate its claim that neither it nor TFC earned credit revenue on its home market sales and therefore properly resorted to facts available. Defendant-Intervenors also contend the Department reasonably determined the statutory preference is a single CEP profit for all sales under consideration.

#### STANDARD OF REVIEW

In reviewing a final determination by Commerce, this Court must sustain the determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (1994). Substantial evidence is that which "a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 71 S. Ct. 456, 459, 95 L. Ed. 456 (1951) (citation omitted), quoted in *Matsushita Elec. Indus. Co., Ltd. v. United States*, 3 Fed Cir. (T) 44, 51, 750 F.2d 927, 933 (1984). For purposes of judicial review, the evidence before this Court is limited to the evidence contained in the administrative record. See *Neuweg Fertigung GmbH v. United States*, 16 CIT 724, 726, 797 F. Supp. 1020, 1022 (1992). The Court is not to substitute its own determination for the agency's but rather is to determine whether Commerce's determination is supported by substantial evidence on the record and is otherwise in accordance with law. See, e.g., *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620, 86 S. Ct. 1018, 1026, 16 L. Ed.2d 131 (1966) (noting "the possibility of drawing two inconsistent conclusions from the evidence does not permit an administrative agency's finding from being supported by substantial evidence"); *Universal Camera Corp.*, 340 U.S. at 488, 71 S. Ct. at 465, 95 L. Ed. at 467-68 (reviewing court may not "even as to matters not requiring expertise \* \* \* displace the [agency's] choice between two fairly conflicting views, even though the court would justi-

fably have made a different choice had the matter been before it *de novo*).

In determining whether Commerce's interpretation and application of the antidumping statute is in accordance with law, this Court applies the two-step test set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). *Chevron* first directs the Court "to determine whether Congress has directly spoken to the precise question at issue." *Id.* at 842-43 (internal quotations and citations omitted). If the statute is unambiguous as to the issue at hand, then the court must give effect to the intent of Congress. *Id.* However, "[i]f the statute is silent or ambiguous with respect to the specific issue, the question for the Court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843 (footnote omitted). Thus, the second element of the *Chevron* test directs the Court to consider the reasonableness of an agency's interpretation. The Court must accord substantial weight to the agency's interpretation of a statute it administers. *See American Lamb Co. v. United States*, 4 Fed. Cir. (T) 47, 54, 785 F.2d 994, 1001 (1986). While Commerce has discretion in choosing one interpretation over another, "[t]he traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress." *Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 368, 106 S.Ct. 681, 686, 88 L.Ed.2d 691 (1986), *cited in Ceramica Region Montana, S.A. v. United States*, 10 CIT 399, 405, 636 F. Supp. 961, 966 (1986) ("[T]his Court will not allow an agency, under the guise of lawful discretion, to contravene or ignore the intent of the legislature or the guiding purpose of the statute"), *aff'd*, 5 Fed. Cir. (T) 77, 810 F.2d 1137 (1987).

#### DISCUSSION

##### I. Commerce's Use of Facts Otherwise Available

In the *Final Results*, Commerce determined with respect to the issue of Toyota's expenses:

In light of Toyota's inability to establish the accuracy of the data that it submitted regarding its home market direct advertising and home market indirect selling expenses, we were unable to include these reported expenses as adjustments to home market price in determining [normal value]. \* \* \*

This approach is consistent with the Department's practice in other cases. \* \* \*

The same approach with respect to Toyota's selling expenses is appropriate, given Toyota's failure to provide basic source documentation at verification. \* \* \* It is standard Department practice to review source documentation at a level of detail greater than a semi-annual report and to require documentation that ties reported expenses to a company's financial statements. Accordingly, we were unable to verify the accuracy of these claimed expenses.

Our verification report reveals that, while Toyota succeeded in providing detailed support documentation for other expenses, it

was unprepared to provide sufficient and necessary documentation to support the expenses at issue. \* \* \*

\* \* \* This is true despite clear instructions in the Department's verification outline of the need to be prepared to provide such documentation. \* \* \*

\* \* \* [B]ecause we could not verify the relevant information, the use of facts available for these expenses is an appropriate measure in this review. In addition, in light of Toyota's failure to provide basic source documentation regarding the expenses at issue, along with the fact that the company was given sufficient notice that such documentation would be required at verification, we have determined that Toyota has failed to cooperate by not acting to the best of its ability to comply with our requests for information.

*Final Results*, 62 Fed. Reg. at 5,594-95.

Sections 1677e(a) and (b) of title 19, United States Code, which provides the basis for Commerce's determination on this issue, provide, in pertinent part:

(a) In general

If—

\* \* \* (2) an interested party or any other person—

\* \* \* (C) significantly impedes a proceeding under this subtitle, or  
(D) provides such information but the information cannot be verified as provided in section 1677m(i) of this title,

the administering authority and the Commission shall, subject to section 1677m(d) of this title, use the facts otherwise available in reaching the applicable determination under this subtitle.

(b) Adverse Inferences

If the administering authority or the Commission (as the case may be) finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority or the Commission, the administering authority or the Commission (as the case may be), in reaching the applicable determination under this subtitle, may use an inference that is adverse to the interests of the party in selecting from among the facts otherwise available. \* \* \*

19 U.S.C. § 1677e(a) and (b) (1994).

Plaintiff argues the Department's use of facts otherwise available with respect to its reported home market indirect selling expenses, home market direct advertising expenses, and direct U.S. selling expenses incurred in Japan in response to plaintiff's inability, despite its best efforts, to produce certain documents, is inappropriately punitive. Toyota asserts the Department's use of facts otherwise available, where an interested party provides information but it cannot be verified, is

governed by a two-part inquiry. According to the plaintiff, 19 U.S.C. § 1677e(a)(2)(D)<sup>1</sup> allows the Department to use facts otherwise available if certain conditions are met and further permits the Department to draw adverse inferences against a party only if "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information." 19 U.S.C. § 1677e(b) (1994). Plaintiff argues, "the Department's use of facts available and adverse inferences in this review meets none of the above-enumerated statutory conditions." (Pl.'s Br. in Supp. of Mot. for J. Upon Agency R. (Pl.'s Br.) at 5.) Plaintiff further contends

[e]vidence on the record demonstrates that all necessary information was on the record for the Department's determination; that Toyota withheld nothing, and either did provide, or would have provided if given sufficient notice, the information requested in a timely manner; that Toyota did not in any way impede the proceeding; and that the Department did, contrary to its suggestions, verify Toyota's information in a manner identical to previous proceedings.

(*Id.*) Plaintiff contends the substantial documentation it prepared in advance of verification, including the worksheets and financial records used in assembling the questionnaire responses, allowed the Department to verify the data tied to Toyota's semi-annual expense reports and to verify and trace Toyota's allocation for these expenses.

Plaintiff contends the Department could not properly resort to facts otherwise available in this case because none of the conditions set out in 19 U.S.C. § 1677e(a) was satisfied and "[a]ll the information necessary to the Department's determination is on the record and was, as stated in the Department's verification report, verified." (*Id.* at 22.) Plaintiff further argues "[t]he verification report recognizes that these expenses were verified, and that it was only 'further exploration' into 'ancillary and additional' information that the Department was not able to pursue." (*Id.* at 23.) Plaintiff adds, "[m]oreover, the monthly breakdowns which were requested do not provide any information relevant to the Department's inquiry that is not already provided by the semi-annual reports." (*Id.*) Plaintiff maintains it "did not withhold or fail to provide information requested in a timely manner and in the form required", (*id.*), and "[t]he facts demonstrate that Toyota cooperated to the best of its ability, but was simply unable to supply requested documentation that would, in any case, have been duplicative of the information already provided. Under these circumstances, the use of adverse 'facts available' is clearly inappropriate." (Pl.'s Mem. in Reply to Opp'n of Def. and Def.-Intvs. (Pl.'s Reply) at 14.) Toyota concludes it

did not withhold or fail to provide information requested in a timely manner and in the form required, but, rather, prepared for verification on the reasonable assumption that the level of documentary support sought by the Department at previous verifications would

<sup>1</sup> Plaintiff appears to be referring to 19 U.S.C. § 1677e(a)(2)(D) but mistakenly cited to § 1677e(b)(2)(D) in its brief. (Pl.'s Br. in Supp. of Mot. for J. Upon Agency R. (Pl.'s Br.) at 4.)

be sufficient at this verification. In light of this cooperation, the Department's use of facts available as a substitute for Toyota's verified expense data is unwarranted, unsupported, and is contrary to law and the Department's regulations.

(Pl.'s Br. at 25.)

Plaintiff further contends even if the Department's resort to facts otherwise available was lawful, the Department's choice of adverse inferences is not supported by substantial evidence on the record and is not otherwise in accordance with law. Plaintiff explains the Department is required to use facts available which are reasonable under the circumstances and may draw an adverse inference only if the interested party "has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority." 19 U.S.C. § 1677e(b) (1994). Plaintiff argues in this case Commerce failed to follow the statute's mandate since the facts used were not reasonable under the circumstances and since Toyota acted to the best of its ability to comply with a request for information. Plaintiff concludes "[i]n light of evidence demonstrating the existence of the substantial expenses, it was unreasonable and improper for the Department to disallow the entirety of Toyota's home market deduction for these expenses, while using these same expenses to distort and inflate Toyota's [dumping] margin." (Pl.'s Br. at 27-28.)

Based on the statutory language and plaintiff's actions, defendant argues Commerce's determination is supported by substantial evidence on the record and is otherwise in accordance with law. Defendant highlights Commerce's Verification Report, which states "Toyota reported its home market direct advertising and sales promotion expense [AD-VERTH] by media and allocated the total expense by sales value", (Def.'s Br. at 19 (quoting Commerce's Verification Report, *reprinted in* Def.'s App. at 56, 73)), and observes when Commerce requested monthly documentation or other records to support these claimed expenses, Toyota officials failed to provide the information in a timely manner. Defendant contends similarly, in the case of Toyota's claimed indirect selling expenses reflecting advertising and sales promotion (INDIRSH), Commerce requested documentation detailing the expenses on a monthly basis but Toyota informed Commerce it could not provide Commerce with the monthly breakdowns for some of Toyota's indirect selling expenses despite Toyota's knowledge that "[i]t is standard Department practice to review source documentation at a level of detail greater than a semi-annual report." (*Id.* at 17 (quoting *Final Results*, 62 Fed. Reg. at 5,595 (footnote omitted))).

Defendant additionally adds the record reveals Toyota never disputed it had access to documents more detailed than the semi-annual reports shown to Commerce's verification officials. Defendant concludes because Commerce could not verify the information that it had received and because Toyota failed to cooperate to the best of its ability, Commerce properly applied facts otherwise available and applied an adverse

inference pursuant to 19 U.S.C. § 1677e(b) when it excluded the home market selling expenses from normal value, employed them in the establishment of home market prices as used in the sales-below-cost test and in calculating constructed value, and included the advertising expenses incurred on United States sales in CEP profit. Defendant contends, "Commerce's approach \*\*\* is a rational response to Toyota's failure at verification to support its claimed adjustments to normal value for these expenses and to cooperate to the best of its ability." (*Id.* at 18.) Defendant concludes, "because Toyota did not provide the necessary documents to Commerce for verification, Commerce's determination to deny Toyota's claimed \*\*\* adjustments for some purposes, but not for others, is reasonable, supported by substantial evidence, and in accordance with law." (*Id.*)

Defendant also argues Commerce's decision to reject Toyota's claimed selling expenses as adjustments to normal value but not for cost, constructed value and CEP profit purposes constitutes a reasonable application of partial, adverse facts available and is not, as Toyota argues, out of proportion to the perceived deficiency at verification. Defendant argues Toyota's argument "overlooks the fact that the total margin analysis involves different calculations that take into account the same claimed expenses" and "Commerce must examine how, for each component of the total margin analysis, a respondent might benefit by failing to provide requested information." (*Id.* at 23.) Defendant argues, as a result, Commerce acted consistently when it denied Toyota's claimed expenses in calculating normal value but included the claimed expenses as an adjustment to sales price in the context of the cost test, and defendant asserts Commerce's treatment of the claimed INDIRSH and ADVERTH variables, while adverse to Toyota's interests, is not punitive.

Defendant-Intervenors argue the statute does not allow the Department to rely on unverified data to calculate dumping margins and "[i]n this case, \*\*\* the Department was unable to verify the accuracy of Toyota's claimed adjustments for home market advertising expenses and certain home market indirect selling expenses" because "Toyota failed to provide information on the monthly breakdown of these expenses to support its claims for these two adjustments." (Def.-Intvs.' Br. at 14.) Defendant-Intervenors maintain Toyota's contention the Department should have ignored the selling expenses at issue when calculating the cost of production and the constructed value would allow Toyota to benefit from its failure to cooperate and provide the Department with information at verification. Defendant-Intervenors contend the Department reasonably relied on the unverified expenses reported by Toyota to calculate Toyota's costs as accurately as possible and to ensure Toyota would not benefit from failing to provide supporting documentation. Defendant-Intervenors conclude, "[t]he action taken by the Department was therefore not punitive nor duplicative. Rather, the Department included these costs in cost of production and constructed

value to ensure that Toyota's costs were not improperly understated." (*Id.* at 17-18.)

Defendant-Intervenors argue this Court's decision in *AK Steel Corp. v. United States*, 988 F. Supp. 594 (CIT 1997), in which the Court examined whether the Department properly relied on best information available (BIA) when it was unable to verify the accuracy of certain information provided by the respondent, supports defendant's position. Defendant-Intervenors assert the respondent in *AK Steel Corp.* argued it had fully complied with the Department's request for information and that the Department's refusal to accept the accuracy of the respondent's data was unreasonable. Defendant-Intervenors explain the Court rejected the respondent's arguments in *AK Steel Corp.*, finding the verification procedure used by the Department was reasonable and the record demonstrated the respondent failed to provide the documentation needed at verification to support its claims. Defendant-Intervenors conclude, "[t]he *AK Steel* case confirms that the Department acted properly in the review underlying this appeal by refusing to rely on information that could not be verified." (Def.-Intvs. Jan. 6, 1998 letter to Court at 2).<sup>2</sup>

This Court finds Commerce's denial of Toyota's claimed selling expenses as adjustments to normal value and its use of facts otherwise available with respect to the company's reported home market indirect selling expenses, home market direct advertising expenses, and U.S. direct selling expenses incurred in Japan are not punitive, as plaintiff claims, are supported by substantial evidence on the record and are otherwise in accordance with law. The Court notes Commerce stated, "[t]he verification process was frequently delayed while company officials searched for requested materials and made photocopies. \*\*\* [C]ompany officials had difficulty collecting ancillary and additional documentation. \*\*\* As a result of the \*\*\* delay in receiving certain documents, there was inadequate time to explore discrepancies found at verification." (Commerce's Verification Report, reprinted in Def.-Intvs.' Br. Ex. 6 at 3.) The Court also notes Commerce's further statement that with respect to some of Toyota's claimed direct advertising expenses, it "requested to see monthly details of these expenses and to be provided with documentation or records to support these various claimed expenses" but "[c]ompany officials claimed that they were unable to provide us with this information in a timely manner." (*Id.* at 18.) Commerce also stated with respect to Toyota's claimed indirect selling expenses

<sup>2</sup> Plaintiff objects to defendant-intervenors' interpretation of the *AK Steel* decision, arguing "the court should recognize that it does not support defendant-intervenors' position." (PL's Jan. 22, 1998 letter to Court.) Plaintiff contends the case at issue is very different from the *AK Steel Corp.* case and argues

[i]n the case of the home market credit expense issue, first, plaintiff \*\*\* did not fail to present affirmative support for a critical set of data, as did respondent in *AK Steel*. Instead Toyota was unable to produce a specific document (the financial statements of TFC) that Commerce thought might help prove the negative—the absence of home market credit expense. A failure to verify critical affirmative data is very different from an inability to present a document that may or may not prove the absence of one element of the Department's calculation.

*Id.* at 2. Plaintiff further maintains in *AK Steel Corp.*, Commerce specifically informed respondent the items at issue would be verified, but in the case at issue, Commerce neglected to tell Toyota TFC's financial statements were needed until "the eleventh hour of verification, when it was too late to obtain them." (*Id.* at 3 (footnote omitted).) Plaintiff finally contends the Court in *AK Steel Corp.* found respondent had been given adequate time to provide the documentation while in this case Toyota was given neither time nor notice.

that it "requested to see monthly details of these expenses and to be provided with documentation or records to support these various claimed expenses" but "company officials informed us that it would take a great deal of time to obtain this information, which included going to a warehouse, and that in any event they could not provide this information before verification was completed. Department officials could not proceed further with this topic." (*Id.* at 24.) Based on the evidence in the record, the Court finds Commerce's decision to reject Toyota's claimed selling expenses for purposes of calculating normal value, while relying on this information to calculate constructed value and cost of production, is supported by substantial evidence on the record and is otherwise in accordance with law. As Commerce explained "not doing so \*\*\* would have rewarded Toyota for its failure to establish the accuracy of these expenses at verification." *Final Results*, 62 Fed. Reg. at 5,594.

## II. Credit Revenue

Toyota objects to the Department's decision to add an amount to home market sales for credit revenue based on the amount of credit revenue that was added to comparable United States sales. With respect to the Department's decision, pursuant to 19 U.S.C. § 1677e, to impute to Toyota an amount for credit revenue to home market sales as facts otherwise available, Commerce noted

Toyota reported that it did not earn credit revenue on home market sales. Whether Toyota in fact earned such revenue was a legitimate inquiry for us to pursue at verification. As discussed further below, based on the verification outline, petitioners' pre-verification comments, and our specific requests at verification, Toyota should have been prepared to provide us with TFC's financial statements, a basic source document necessary to explore this issue. By not providing Department officials with the financial statements, Toyota did not provide the Department with the opportunity to ascertain for itself whether the financial statements contained information relevant to our inquiry.

Because Toyota failed to provide us with TFC's financial statements, we have determined that Toyota failed to act to the best of its ability with respect to this issue by withholding information. Therefore, we have relied on an inference that is adverse to the interests of Toyota. Accordingly, as facts available, we applied the transaction-specific gross revenue earned by Toyota Motor Credit Corporation (TMCC) on relevant U.S. sales (revenue without the corresponding offsetting credit expense) to the weighted-average home market price of matched sales.

*Final Results*, 62 Fed. Reg. at 5,596. Commerce explained Toyota could not reasonably claim it had no advance notice the Department would request an examination of TFC's financial statements since the verification outlined clearly indicated this type of document would be subject to review. *See id.* Commerce further maintained, "[g]iven that TFC is a consolidated subsidiary of TMC, Toyota should have made such a document available to Department officials for inspection" especially because "the

issue of TFC's involvement in home market transactions has been a recurring one in administrative reviews of this order." *Id.*

Plaintiff argues the Department's resort to facts otherwise available to add credit revenue to home market sales is not supported by substantial evidence on the record and is not otherwise in accordance with law because the Department never requested TFC's financial statements until verification and "it was simply not possible, given the inadequate notice provided, to assemble, and to obtain the necessary clearances to release, these confidential documents." (Pl.'s Br. at 12.)<sup>3</sup> Plaintiff argues Commerce only requested source documents, such as TFC's financial statements, from "companies involved in the sale and distribution of forklift trucks, as identified in [Toyota's] submission", (Verification Outline, reprinted in Def.'s App. at 34), and TFC has never been identified as such. Plaintiff further argues, "TFC's financial statements have never been requested in previous verifications, because TFC has never been involved in the production and sale of subject merchandise." (Pl.'s Br. at 9.) Plaintiff explains

TFC's financial statements were not prepared in advance because there was no request in the verification outline. While TFC's financial statements were requested at verification, they were requested on the penultimate day of verification, giving Toyota less than 36 hours to provide the confidential business information of a separate corporation that had no involvement in the sales at issue.

(*Id.* at 10.) Plaintiff argues, "[b]efore Commerce may find any noncompliance on the parties to the proceeding, there must be a clear and adequate communication requesting the information \* \* \*", (*id.* (quoting *Mitsui & Co., Ltd. v. United States*, 18 CIT 185, 203 (1994))), as well as "a reasonable and meaningful opportunity to comply," and in this case, "there was no such clear and adequate communication." (Pl.'s Reply at 3 (quoting *Mitsui & Co., Ltd.*, 18 CIT at 203).) Plaintiff contends it was not put on notice "that TFC's financial statements would be requested, or that, if Toyota did not prepare the financial statements in advance of verification, Commerce would heavily penalize Toyota with adverse adjustments." (*Id.* at 5.)<sup>4</sup>

Plaintiff further argues even if Commerce's resort to facts otherwise available as a means of valuing home market credit revenue were lawful, the Department's choice of facts otherwise available was unlawful and

<sup>3</sup> Plaintiff explains the only reason TFC in Japan became an issue at verification is that Toyota sells its merchandise in the United States through a United States financing arm, Toyota Motor Credit Corporation (TMCC). Because TMCC's involvement resulted in credit revenue for United States sales, petitioners speculated that TFC might provide financing and therefore earn offsetting credit revenue on sales in Japan. Plaintiff explains, "In other words, Petitioners and the Department were inquiring about TFC to determine whether Toyota's claimed adjustment to U.S. price for credit revenue—with no offsetting adjustment for credit revenue in the home market—was justified." (Pl.'s Br. at 13.)

<sup>4</sup> Plaintiff adds with respect to the Department's inquiry into whether TFC was involved in financing forklift trucks, (i) the Department was able to examine thoroughly numerous home market sales, including payment receipts from dealers that would have revealed any TFC involvement, and found no sale in which TFC had any involvement whatsoever. Indeed, not once, during an entire week of examining sales documentation, did TFC come up as being involved in any way in the transactions at issue. The Department was able to interview TFC officials, who confirmed this fact, and was able to examine certain TFC documentation. The one document that Toyota was not able to provide on the short notice allowed was TFC's financial statements, which, like all of the other documents examined by Commerce, would have contained no mention of forklift truck financing.

(Pl.'s Reply at 7-8 (internal citations and footnote omitted).)

the adverse inferences used were disproportionate and excessively punitive. Toyota argues it acted to the best of its ability to comply with the Department's requests for information and contends the information it did provide clearly indicated TFC was not involved in financing sales of subject merchandise in Japan. Plaintiff also argues the Department's resulting adjustments to home market price for supposed credit revenue earned on home market sales is far in excess of any credible or reasonable amount. Plaintiff contends, "[e]ven assuming, therefore, that there was an unjustified failure on the part of Toyota to provide information on TFC—which there was not—the most severe consequence should be to neutralize any favorable impact of the U.S. credit revenue." (Pl.'s Br. at 13.)<sup>5</sup> Plaintiff concludes, "the Department hit Toyota with a very punitive adjustment to normal value. This punitive amount is entirely out of proportion both to Toyota's 'failure' to provide the requested document, and to the relatively minor net credit revenue reported for U.S. sales." (*Id.* at 16.)

Defendant contends four factors support its argument Toyota "could not have been surprised, and should have been prepared, to produce TFC's financial statements upon Commerce's request." (Def.'s Br. at 26.) The four factors defendant cites are: (1). Commerce specifically inquired about TFC in its pre-verification questionnaires; (2). petitioners repeatedly encouraged the Department to focus on Toyota's home-market forklift sales financing arrangements; (3). Commerce's verification agenda instructed Toyota to be prepared to produce affiliated-party financial statements; and (4) Toyota's home market credit revenues were an issue in the second administrative review covering 1989-90. (*See id.*) Defendant explains Toyota indicated only that TFC was not involved in any financing transactions between Toyota Automatic Loomworks, Ltd. (TAL) or TMC and its affiliated and unaffiliated dealers, but did not explain the discrepancy between Toyota's voluminous sales in Japan during the period of review and Toyota's claim that despite TFC's substantial credit revenues, it was not involved in financing forklift truck sales in Japan. Defendant concludes, "where, as here, petitioners consistently endeavor to focus Commerce's attention upon a valid line of inquiry, respondents cannot claim lack of notice when Commerce probes more deeply into the area of inquiry at verification." (*Id.* at 28.) Defendant maintains Toyota's failure "precluded Commerce from ascertaining what, if any, financing arrangements Toyota had provided its domestic forklift customers during the POR", (*id.* at 25), and, as a result, Commerce properly applied the transaction-specific gross revenue earned by Toyota Motor Credit Corporation on relevant United States sales to the weighted-average home market price of matched sales.

<sup>5</sup> In response to plaintiff's claim the Department's choice and use of facts otherwise available were unlawful because the amount of the adjustment claimed was in excess of any credit or reasonable amount and the only steps the Department should have taken would have been to "neutralize" any favorable impact of U.S. credit revenue, defendant-intervenors cite the Department's *Final Results*, which state the Department's purpose "is not to neutralize the benefit Toyota obtained on financing certain U.S. sales, but rather is a response to Toyota's failure to comply with a specific request to produce a document that would permit [the Department] to ascertain whether TFC was involved in home market transactions." (Def.-Intvs.' Br. 22 (quoting *Final Results*, 62 Fed. Reg. at 5,596).)

Defendant additionally argues the statute's mandate allowing Commerce to employ an adverse inference when, as here, "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information", 19 U.S.C. § 1677e(b), permits Commerce to apply an adverse inference with respect to this issue. Defendant contends Toyota did not cooperate to the best of its ability due to its general lack of preparedness at verification, as well as its failure to provide Commerce with sufficient information about TFC, specifically TFC's financial statements, to confirm Toyota's claim that TFC had no involvement in the financing of home-market forklift truck sales.

Defendant-Intervenors respond to Toyota's claims by arguing "[w]hile Toyota again attempts to recharacterize its own actions by claiming that it fully 'cooperated' with the Department, Toyota's contention that TFC's financial statements 'were not prepared in advance' and were therefore not available again points to Toyota's efforts to control the verification." (Def.-Intvs.' Br. at 21 (citing Pl.'s Br. at 10).) Defendant-Intervenors maintain one of the purposes of verification is to review supporting financial documents that the respondent should have available but will not have "prepared" for purposes of verification. Defendant-Intervenors also contend even though Toyota failed to provide supporting documentation, the Department did not reject Toyota's response in its entirety nor did it apply the most adverse facts available, for example, by adding the highest credit revenue earned on any U.S. sale to each home market sale. Defendant-Intervenors contend, "[r]ather, the Department simply applied the same credit revenue from the comparable U.S. sale to the home market sale." (*Id.* at 10.) Defendant-Intervenors additionally argue although Toyota suggests the Department made an adjustment for credit revenue in the home market without making a corresponding adjustment for credit expense, "the record clearly shows that the Department *did* make an adjustment for credit expenses based on Toyota's reported claim for this expense." (*Id.*)

This Court finds Commerce's determination to impute to Toyota home market credit revenue as adverse facts otherwise available based upon Toyota's failure at verification to produce the requested financial statements of an affiliated entity is supported by substantial evidence on the record and is otherwise in accordance with law. The Court acknowledges plaintiff's argument that

Commerce's verification outline did *not* request that Toyota present or prepare to submit the TFC financial statements at verification. The "Summary of Required Source Documents," which the Government attempts to equate to a "clear and adequate" request for TFC's financial statements, is an "illustrative list of the *type* of source documents to be examined during verification." It is a *definition* of "source documents," not a request for financial statements of particular Toyota entities

(Pl.'s Reply at 5 (citations omitted)). The Court also acknowledges plaintiff's assertion "[t]he Department gave no warning that it would

require [TFC's financial statements]", (*id.* at 8), but finds evidence on the record clearly indicates Toyota should have anticipated Commerce would request TFC's financial statements at verification. The Court further notes Commerce stated, "[a]t verification we requested company officials to provide us with financial statements of [TFC] and to establish that TFC is not involved in the home market transactions between TMC and its affiliated and unaffiliated dealers" but "[c]ompany officials were unable to provide us with TFC's financial statements nor any other documentation to show the breakout of activities engaged in by TFC." (Aug. 2, 1998 Mem. Re. Admin. Rev. at 10, 11, *reprinted in* Def.-Intvs.' Br. Ex. 6.) The Court believes Commerce reasonably inferred from information Toyota provided in its original questionnaire response that TFC might have a role in financing home market forklift truck sales.<sup>6</sup> The Court does not agree with plaintiff's argument "there is no evidence that the financial statements requested by the Department would have contained any information which would have been necessary to an accurate determination", (Pl.'s Br. at 11 (citation omitted)), or that "[a]ll necessary information to properly resolve the issue of TFC's non-involvement with the production and sale of subject merchandise is on the record." (*Id.* at 20.)

The Court notes plaintiff cites *Final Determination of Sales at Less Than Fair Value: Certain Pasta From Italy*, 61 Fed. Reg. 30,326, 30,329 (Dep't Comm. 1996) for the proposition "[b]ecause [respondent] made some effort to cooperate, even though it did not cooperate to the best of its ability, we did not chose the most adverse rate based on the petition", (Pl.'s Br. at 19), and finds in this case, as defendant points out, Commerce did not apply the most stringent adverse inference that could have been imposed, embodying Commerce's recognition that Toyota failed to cooperate to the best of its ability only with respect to certain types of information. This Court previously stated, "a party cannot control the results of the administrative process via its own unresponsiveness." *Mitsuboshi Belting Ltd. v. United States*, No. 93-09-00640, 1997 WL 118397, at \*3 (CIT Mar. 12, 1997) (citing *Pistachio Group of the Ass'n of Food Indus., Inc. v. United States*, 11 CIT 668, 679, 671 F. Supp. 31, 40 (1987)). As a result, the Court holds Toyota did not cooperate to the best of its ability to comply with Commerce's requests for information and finds Commerce acted properly pursuant to 19 U.S.C. § 1677e(b) when it employed an adverse inference with respect to this issue. The Court further finds Commerce's choice of facts otherwise available is supported by substantial evidence on the record and is otherwise in accordance with law and upholds Commerce's determination to impute, as adverse, partial facts available, the gross credit revenues earned on Toyota's U.S. sales to comparison home-market sales.

<sup>6</sup> In its original questionnaire response at section A, Toyota reported that

Business in financial services is our biggest source of revenues by far in diversified operations. That business consists primarily of financing for Toyota dealers and their customers in markets around the world.

We provide financing for dealers and customers through finance companies in Japan \*\*\*.

(Toyota's Principal Questionnaire Response, *reprinted in* Def.'s App. at 100.)

### III. *Constructed Export Price Profit*

Toyota also objects to the Department's calculation of a single, aggregated CEP profit from sales of Toyota's small and large forklift trucks<sup>7</sup> based on the Department's treatment of the trucks as a single "foreign like product."<sup>8</sup> In the *Final Results*, the Department stated with respect to its calculation of CEP profit

In accordance with our practice as described in the *Proposed Regulations* (at 7382), we have used the aggregate of expenses and profit for all subject merchandise sold in the United States and all foreign like products sold in the exporting country. During the POR, Toyota sold both small and large trucks in the United States. While only a small quantity of small trucks were sold in the United States, home market sales of trucks of these categories are nonetheless potential matches. \* \* \*

The statute does not require separate CEP-profit calculation based on the narrow interpretation of the term "foreign like product" advanced by Toyota. \* \* \* "[N]either the statute nor the SAA [Statement of Administrative Action] require us to calculate CEP profit on a basis more specific than the subject merchandise as a whole. \* \* \* [T]he statute and SAA, by referring to 'the' profit, 'total actual profit' and 'total actual expenses,' imply that we should prefer calculating a single profit figure."

*Final Results*, 62 Fed. Reg. at 5,599 (quoting *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Singapore and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews*, 62 Fed. Reg. 2,081, 2,125 (Dep't Comm. 1997)). The statute provides

(d) Additional adjustments to constructed export price

For purposes of this section, the price used to establish constructed export price shall also be reduced by—

(1) the amount of any of the following expenses generally incurred by or for the account of the producer or exporter, or the affiliated seller in the United States, in selling the subject merchandise (or subject merchandise to which value has been added)—

\* \* \* \* \*

<sup>7</sup> Defendant indicates "'small' refers to those forklift trucks with load capacity ranges from 2,000 to 3,000 pounds, 3,001 to 5,000 pounds, and 5,001 to 6,999 pounds," ranges which defendant explains "correspond to categories one through three in Commerce's questionnaire." (Def.'s Br. at 34 n.6.) Defendant explains, "'[l]arge' forklift trucks, by contrast are those with load capacity ranges from 7,000 to 10,000 pounds, and from 10,001 to 15,000 pounds," ranges which defendant explains "correspond with categories four and five in Commerce's questionnaire." (*Id.* at 34-35.)

<sup>8</sup> "Foreign like product" is defined, in relevant part, as

(A) The subject merchandise and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise.

(B) Merchandise—

(i) produced in the same country and by the same person as the subject merchandise,  
(ii) like that merchandise in component material or materials and in the purposes for which used, and  
(iii) approximately equal in commercial value to that merchandise.

(C) Merchandise—

(i) produced in the same country and by the same person and of the same general class or kind as the merchandise which is the subject of the investigation,  
(ii) like that merchandise in the purposes for which used, and  
(iii) which the administering authority determines may reasonably be compared with that merchandise.

19 U.S.C. 1677(16) (1994).

(2) the cost of any further manufacture or assembly (including additional material and labor), except in circumstances described in subsection (e) of this section; and

(3) *the profit* allocated to the expenses described in paragraphs (1) and (2).

19 U.S.C. § 1677a(d) (1994) (emphasis added). The statute also provides:

(f) Special rule for determining profit

(1) In general

For purposes of subsection (d)(3) of this section, profit shall be an amount determined by multiplying the total actual profit by the applicable percentage.

(2) Definitions

For purposes of this subsection:

\* \* \* \* \*

(C) Total Expenses

The term "total expenses" means all expenses in the first of the following categories which applies and which are incurred by or on behalf of the foreign producer and foreign exporter of the subject merchandise and by or on behalf of the United States seller affiliated with the producer or exporter with respect to the production and sale of such merchandise:

(i) The expenses incurred with respect to the subject merchandise sold in the United States and the foreign like product sold in the exporting country if such expenses were requested by the administering authority for the purpose of establishing normal value and constructed export price.

(ii) The expenses incurred with respect to the narrowest category of merchandise sold in the United States and the exporting country which includes the subject merchandise.

(iii) The expenses incurred with respect to the narrowest category of merchandise sold in all countries which includes the subject merchandise.

(D) Total actual profit

The term "total actual profit" means the total profit earned by the foreign producer, exporter, and affiliated parties described in subparagraph (C) with respect to the sale of the same merchandise for which total expenses are determined under such subparagraph.

19 U.S.C. §§ 1677a(f) (1994).

Plaintiff argues CEP profit is calculated with respect to the "foreign like product" and "if there are two separate foreign like products, there have to be two separate CEP calculations. In this case, plaintiff argues, there must be a separate CEP profit calculation for large and small trucks." (Pl.'s Reply at 15.) Plaintiff argues the statute requires "that the CEP profit be an average of (1) the profit on the subject merchandise sold in the United States and (2) the home market merchandise that can

be 'satisfactorily' used as normal value for that subject merchandise," (Pl.'s Br. at 29), which Commerce disregarded in the *Final Results* "when it used the profit on small forklifts in Japan to calculate the CEP profit for large forklifts in the United States." (*Id.*)

Plaintiff argues, "where the Department has in effect determined that there are several foreign like products \* \* \* there must be several calculations of CEP profit, each based on the profit of the U.S. sales and the home market sales in that category." (*Id.* at 31.) Plaintiff further contends Commerce defined two foreign like products categories for the large trucks and three categories of small forklifts, which "could not legally serve as normal value for any of the large-capacity forklift trucks." (*Id.* at 32.) Plaintiff argues Commerce's approach is "highly distortive because Toyota's profit on small trucks is much higher than its profit on large trucks, and there are many more sales of small trucks than of large trucks. The result of this illegal calculation, therefore, is a significant overstatement of CEP profit." (*Id.* at 30.) Plaintiff maintains

If there is a category of home market sales (e.g., small forklift trucks), which the Department itself has determined *cannot* satisfactorily serve as normal value for another category of U.S. sales (e.g., large forklift trucks), then the small forklift trucks are not, by statutory definition, the "foreign like product" to the large trucks. Therefore, the CEP profit for the large trucks cannot be based on the profit of the small trucks, which are not a foreign like product vis-a-vis the large trucks.

(*Id.* at 32-33.)

Plaintiff additionally argues the Department's justifications for calculating a single CEP profit rate in this review are without merit. Plaintiff contends defendant's claim the statutory references to "total" actual profit, "total" U.S. expenses and "total" expense "can just as easily refer to a separate 'total' for each foreign like product as it can to a single 'total' for all foreign like products grouped together." (Pl.'s Reply at 15.) Plaintiff contends although small home market trucks were potential matches for small U.S. forklift trucks, "they were not potential matches for any of the large trucks. Therefore, their profit should not have been allocated to the large trucks." (Pl.'s Br. at 37.) Plaintiff additionally maintains, "it makes no sense to inflate the CEP profit" of large forklift trucks "solely because of the sale of a *de minimis* number of small trucks in the U.S. market." (*Id.*) Plaintiff also argues the statute requires Commerce to

calculate as many normal values and constructed export prices as there are products, despite the use of the singular number and the word 'the'. Similarly, the use of the singular number and the word 'the' in connection with CEP profit says nothing whatsoever about whether there should be one or many profit figures.

(*Id.*) Finally, plaintiff argues, "[f]ollowing the statute's mandate to calculate CEP profit based on the profit of the U.S. sales and their foreign

like product does not make it easier to manipulate the profit rates." (*Id.* at 39.) Plaintiff concludes

it is hard to imagine a case where a separate calculation of CEP profit for each foreign like product is more compelling.

\* \* \* \* \*

[The statute] states that the CEP profit should be calculated "with respect to the subject merchandise sold in the United States and the foreign like product"—that is, the foreign product most similar to the subject merchandise sold in the United States—"sold in the exporting country". [The statute] does not say that the profit should be calculated with respect to *all* foreign merchandise, and it does not say that profit should be calculated with respect to the subject merchandise that *could* have been sold in the United States and the foreign like product to those possible U.S. sales. [The statute] states that the profit should be calculated with respect to the subject merchandise *actually sold* in the United States and *its* foreign like product.

Since "the subject merchandise sold in the United States" consists of 7,000 lb.-10,000 lb. and 10,001 lb.-15,000 lb. forklifts, the "foreign like product" for which profit should be calculated should be either (1) the home market forklift trucks selected as *the* such or similar (now "foreign like product") merchandise in the concordance listing; or, at most, (2) the home market products in the "foreign like product" categories, defined by the Department in its questionnaire, that correspond to the 7,000 lb.-10,000 lb. and 10,001 lb.-15,000 lb. forklifts sold in the United States.

(*Id.* at 39-40.)

Defendant argues, "Commerce's determination to calculate a single CEP profit based upon all subject merchandise and foreign like product forklift trucks is a reasonable interpretation of the statute, supported by substantial evidence, and is otherwise in accordance with law." (Def.'s Br. at 34 (footnote omitted).) Defendant contends the CEP profit calculation involves two steps: first, "pursuant to [19 U.S.C. §] 1677a(f), Commerce calculates a 'total actual profit' based upon 'all sales of the subject merchandise and the foreign like product"'; second, "pursuant to [19 U.S.C. §] 1677a(d)(3), Commerce *allocates* this figure to individual CEP transactions as adjusted by [19 U.S.C. §§] 1677a(d)(1) and (2)." (*Id.* at 35 (quoting Import Administration Policy Bulletin 97-1, *reprinted in* Def.'s App. at 87).) Defendant maintains Toyota's small and large forklift trucks constitute a single "foreign like product" for purposes of calculating CEP profit in accordance with the plain meaning of the statute.

Defendant argues the statute does not state that

"total actual profit" and "total expenses" indicate that Commerce must subdivide the foreign like product in order to perform multiple CEP calculations. Indeed, according to [19 U.S.C. §] 1677a(f)(2)(C), the basis upon which CEP profit is to be calculated is *all* subject merchandise sold in the United States and *all* foreign like product sold abroad.

(*Id.* at 38 (footnote omitted).) Defendant further contends the statute's definition of "foreign like product" in 19 U.S.C. § 1677(16) "adds nothing in support of Toyota's argument that Commerce must calculate separate CEP profits for the separate forklift load-capacity categories" and "Toyota's proposed narrow construction of 'foreign like product' finds no support in \* \* \* legislative history." (*Id.* at 38, 39.)

Defendant argues Commerce's position regarding "foreign like product" in this case is consistent with previous determinations. (*See id.* at 40 (citing *Notice of Final Determination of Sales at Less Than Fair Value: Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, From Japan*, 61 Fed. Reg. 38,139, 38,146 (Dep't Comm. 1996) (*LNPP From Japan*)). In that investigation, Commerce disagreed with respondent's assertion there had been no sales of the foreign like product in Japan. Commerce determined even though it did not find home market sales which provided "practicable price-to-price matches," respondent was incorrect to argue no foreign like product existed. *See LNPP From Japan*, 61 Fed. Reg. at 38,144. Defendant argues Commerce similarly noted in this case "[w]hile only a small quantity of small trucks were sold in the United States, home market trucks of these categories are nonetheless potential matches. Accordingly, the foreign like product in this review encompasses both small and large trucks." (Def.'s Br. at 41 (quoting *Final Results*, 62 Fed. Reg. at 5,599).)

Defendant additionally argues, "[t]he narrow construction of the CEP-profit provisions advanced by Toyota conflicts with at least one other section of the antidumping statute." (*Id.*) Defendant explains Toyota's argument for multiple foreign like products would "undermine Commerce's ability to conduct a unified home market viability analysis" in that "Toyota's approach could lead to a finding of viability with respect to some load-capacity categories of forklifts, but not with respect to others" which "would potentially require Commerce to base normal value both upon home-market and third-country sales in the same investigation or administrative review, and would add unnecessary complexity to Commerce's administration of the antidumping law." (*Id.* at 41-42.)

Defendant further argues Commerce's determination to treat Toyota's small and large forklifts as one foreign like product for CEP profit calculation purposes is consistent with agency precedent. (*See id.* at 42-44 (citing *Color Picture Tubes From Japan; Final Results of Antidumping Administrative Review*, 62 Fed. Reg. 34,201, 34,212 (Dep't Comm. 1997) (Commerce rejected a narrow construction of foreign like product for CEP profit purposes and stated, "our calculation of CV and CEP profits should include all home market sales during the POR of the foreign like product"); *Professional Electric Cutting Tools From Japan; Final Results of Antidumping Duty Administrative Review*, 62 Fed. Reg. 386, 390 (Dep't Comm. 1997) (Contrary to petitioners' argument 19 U.S.C. § 1677(16) required Commerce to calculate constructed value

and CEP profit using only the home market sales which could be matched most closely to the subject merchandise, Commerce employed a broader reading of "foreign like product" and stated "[f]or purposes of calculating CV and CEP profit, we interpret the term 'foreign like product' to be inclusive of all merchandise sold in the home market which is in the same general class or kind of merchandise as that under consideration"); *LNPP From Japan*, 61 Fed. Reg. at 38,146 (Dep't Comm. 1996) (Commerce disagreed with respondent's argument that differences in the Japanese-market large newspaper printing presses rendered them useless as a basis for normal value, and they could therefore not be considered as a foreign like product within the meaning of 19 U.S.C. § 1677(16) and held while "the degree of unique customization for customers" complicated price-matching such that constructed value proved more reliable and administrable, LNPP equipment sold in Japan did constitute the foreign like product under 19 U.S.C. § 1677(16).)

Defendant also maintains Commerce has consistently used a single, all-inclusive foreign like product in calculating CEP profits in accordance with its regulations. Defendant explains Commerce proposed section 351.402(d)(1) to implement 19 U.S.C. § 1677a(f), entitled "Special rule for determining profit," which sets forth Commerce's understanding that a reasonable interpretation of the statute assigns "foreign like product" a broad meaning. The proposed rule states:

In calculating total expenses and total actual profit, the Secretary normally will use the aggregate of expenses and profit for all subject merchandise sold in the United States and all foreign like products sold in the exporting country, including sales that have been disregarded as being below the cost of production.

*Proposed Rules, Antidumping Duties; Countervailing Duties*, 61 Fed. Reg. 7,308, 7,382 (Dep't Comm. 1996). Defendant concludes

[g]iven [Commerce's] consistent and reasonable statements of [its] implementation of the new CEP-profit requirement, this Court should uphold Commerce's construction of 19 U.S.C. §§ 1677(16), 1677a(d)(3) and (f) and Commerce's determination, in this administrative review, to assign Toyota a single, aggregated CEP profit based on all foreign like products, i.e., forklift trucks.

(Def.'s Br. at 46.)

Defendant additionally points out Commerce's policy of calculating a single, aggregated CEP profit from sales of Toyota's small and large forklift trucks in the two markets also addresses Congress' concern that a respondent could manipulate CEP profit and dumping margins by shifting profit allocations to certain subcategories of the subject merchandise. Defendant argues,

Congress' concern regarding the manipulability of CEP profit by respondents is particularly significant when considering Toyota's contention that small trucks "were not potential matches for any of the large trucks," and that "their profit should not have been allocated to the large trucks." If this is so, then Toyota must also recog-

nize that the lines separating product categories within which CEP profit is calculated could be drawn in a great variety of places. \* \* \* Were Commerce to accede to Toyota's proposal, it is easy to imagine the CEP profit calculation devolving into a mathematical contest in which petitioners and respondents subdivide the universe of the subject merchandise depending upon the effect of each profit allocation on the dumping margin. Where, as here, the subject merchandise is complex machinery, the CEP profit exercise would become all the more difficult.

(*Id.* at 47-48 (citation omitted).)

In response to plaintiff's characterization of the Department's calculations as using "the profit on small forklifts in Japan to calculate the CEP profit for large forklifts in the United States," defendant-intervenors argue, "[i]n fact, the Department calculated a single CEP profit that was applied to *all* sales of forklift trucks (both large and small) in the United States based on the profit on home market sales and U.S. sales of both large and small forklift trucks." (Def.-Intvs.' Br. at 24 (quoting Pl.'s Br. at 29).) Defendant-Intervenors also disagree with plaintiff's argument the statute requires the Department to calculate CEP profit based on individual foreign like product categories and contend the statute only refers to "the" profit and "[t]he other provisions dictating the Department's methodology for calculating the profit similarly do not specify that profit must be calculated on 'any basis more specific than [sic] the subject merchandise as a whole.'" (*Id.* (quoting *Final Results*, 62 Fed. Reg. at 5,599).) Defendant-Intervenors further argue, "[i]n this and other cases, the Department has determined that the statutory references to 'the profit' indicate the Department 'should prefer calculating a single profit figure.'" (*Id.* at 24-25 (citation omitted).) Defendant-Intervenors conclude, "[w]hen the statute is read in conjunction with the SAA and legislative history, and express congressional concern over the potential for manipulation, the Department reasonably determined that the statutory preference is a single CEP profit for all sales under consideration." (*Id.* at 25.)

This Court finds Commerce's use of a single, aggregated CEP profit from sales of Toyota's large and small forklift trucks is based on a reasonable interpretation of the statutory language, is supported by substantial evidence on the record and is otherwise in accordance with law. *Chevron* states when "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute," *Chevron*, 467 U.S. at 843 (footnote omitted), and this Court must accord substantial weight to the agency's interpretation of the statute it administers. *See American Lamb*, 4 Fed. Cir. (T) at 54. The Court notes defendant-intervenors' argument the statute does not explicitly require the Department to base CEP profit from sales of individual foreign like product categories and agrees with defendant-intervenors' argument if Congress had intended for the Department to be required to calculate profit

on this basis, such a requirement could easily have been incorporated into the statute. No such requirement exists.

This Court additionally notes the statute instructs Commerce that, for the purposes of adjusting CEP profit, the "profit shall be *an amount* determined by multiplying the *total actual profit* by the applicable percentage." 19 U.S.C. §§ 1677a(f)(1) (1994). The Court finds persuasive defendant's argument the language of the statute requires Commerce to calculate a single figure that is to be allocated across the CEP profit deductions mandated by 19 U.S.C. §§ 1677a(d)(1) and (2). The Court finds Commerce's interpretation it should calculate only one CEP profit is supported by substantial evidence on the record and is otherwise in accordance with law. The Court upholds Commerce's construction of 19 U.S.C. §§ 1677a(d)(3) and (f) and its determination to assign Toyota a single, aggregated CEP profit from sales of all subject merchandise and foreign like forklift trucks.

#### CONCLUSION

For the reasons discussed above, this Court denies Plaintiff's Motion for Judgment Upon the Agency Record and sustains Commerce's *Final Results* in their entirety. Accordingly, the Court dismisses this action.

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(Slip Op. 98-107)

UNITED STATES SHOE CORP., PLAINTIFF v. UNITED STATES, DEFENDANT

Court No. 94-11-00668

#### ORDER RE: RESOLUTION PROCEDURE

RESTANI, Judge: Having considered defendant's and various plaintiffs' proposals for a claim resolution plan to resolve the numerous suits filed with the court to recover unconstitutionally exacted Harbor Maintenance Taxes (HMT) the court proposes the following plan to cover HMT paid on exports.

Parties wishing to file written objections to the plan may do so by August 14, 1998. Hearing on the proposed plan will begin at 11:00 a.m. on August 20, 1998 at the United States Court of International Trade, New York, New York.

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1. Proposed Plan
2. Harbor Maintenance Tax Refund Claim Form
3. Harbor Maintenance Tax Payment Listing and Certification
4. Model Judgement

#### 1. Plan

##### I. *Proposed Claim Resolution Process for HMT on Exports*

#### OVERVIEW

In accordance with its previous determinations the court orders immediate refund to be made for claims accrued within two years of the

filing of plaintiffs' complaint with the court. For some plaintiffs various statute of limitations issues relating to older claims remain outstanding. If necessary, a second refund will be made for older HMT claims related to exports. In addition, the court has determined that interest is owing on refunded amounts, but the United States is entitled to a stay pending appeal of this issue. Accordingly, if interest is finally determined to be owing, the second refund will include payment for whatever interest is owing.

Following submission of a claim form by a plaintiff, the United States Customs Service will perform an initial search of its computer database for Harbor Maintenance Tax exporter payments. Plaintiff will review Customs' information and, if the information is not disputed, will receive refunds for the specified amounts. Any plaintiff who wishes to dispute Customs' information will have an opportunity to do so by submitting appropriate documentation to Customs. Claims that cannot be resolved after the plaintiffs submit their documentation will be submitted to the court for resolution. Thus, the claims disposition process will proceed as follows:

#### *A. Receipt of Claims Forms*

Each plaintiff will complete a claims form (see attached) and return it to Customs (address to be provided) by October 15, 1998. Plaintiff will attach the filed complaint to its claim form. Customs will process refunds in chronological order by date of filing of plaintiff's first complaint.

#### *B. Phase One—Initial Review of all Claims*

##### *1. Customs' Verification*

During Phase One of the claims process, Customs will inform plaintiffs of the quarterly payments verified in its database. To accomplish that, computer technicians will perform queries of Customs' database for each exporter listed on the claims form. Customs will not search its back-up documentation during this phase. Customs will complete its report, listing all of the payments verified by the database and return the HMT Payment Report and Certification ("Certification") form to plaintiff. (See attached.).<sup>1</sup>

##### *2. Plaintiffs' Review*

If it is satisfied with the payments listed on Customs' report, a plaintiff will certify on the same form that it believes it is entitled to a refund in the amount specified. Plaintiff will then fill out and sign a judgement form (see attached) with the Certification attached and return the form to the Department of Justice for signing and filing with the court.

<sup>1</sup> Given the limitations of this database, Customs will perform this initial review based upon the claims form and without documentation for exporters who made payments directly and in their own name. For exporters who used freight forwarders to make payment, in addition to the claims form, the name of the freight forwarder, the name and exporter identification number of the exporter upon whose behalf payment was made, a listing of payment amounts by quarter and the CF349 (Quarterly Summary Report) or other suitable information submitted with the payment must be submitted with the claims form. Without this information, it will be difficult to locate the freight forwarder payments for which the exporter is seeking a refund. With this additional information, Customs will perform the same initial review and complete the Harbor Maintenance Tax Report for payments made by freight forwarders.

### *3. Schedule and Entry of Judgement*

Defendant shall process no fewer than 500 claims per month and will report to the court monthly on its progress. The court expects speed of processing will increase over time. The first set of judgements shall be presented to the court by December 15, 1998. Each 15th day of the month thereafter another set of completed judgement forms shall be presented to the court.

### *C. Phase Two—Disputed Claims*

Plaintiffs who wish to dispute the payments verified by Customs' database will do so during Phase Two, which will begin immediately upon completion of Phase One, but no later than March 15, 1999. Those plaintiffs will supply Customs with documentation supporting their claims for different or additional payments. Customs will query its computer database and perform the additional step of searching its paper records to attempt to resolve the dispute. Customs will then return a revised Harbor Maintenance Tax Payment Report and Certification form to plaintiffs. Administrative review will resolve many disputes; if the revised Certification is satisfactory to plaintiffs, they will then return a judgment with attached Certification form to the Department of Justice for a signature and filing.

### *D. Phase Three—Judicial Review*

If the disputes cannot be resolved, plaintiffs may request judicial resolution by filing a proposed scheduling order with the court. Procedures established by this plan are not intended to apply to cases requiring judicial resolution and whatever substantive or procedural law is normally applicable will apply.

## *II. Resolution of Other Issues*

*Stone Container Corp. v. United States*, Court No. 96-10-02366 and *Swisher Int'l., Inc. v United States*, Court No. 95-03-00322 have been designated test cases on issues relating to jurisdiction and statute of limitations. Any plaintiff who wishes immediate payment on claims covered by a complaint filed within the two years statute of limitations but has included older claims in its complaint must seek severance of the older claims. A proposed order of severance should be filed with the court; a new court number will be assigned and the severed action will be stayed pending resolution of the applicable test case.

Any HMT claim related to any non-export matter must also be severed if immediate judgement is desired on export claims. If there remain any non-export issues for which a test case is not now proceeding, a plaintiff who wishes its case to proceed as a test case on such issue shall so advise the court in its comments on the proposed plan by August 14, 1998.

Court No. \_\_\_\_\_

HARBOR MAINTENANCE TAX REFUND CLAIM FORM

Date of Filing of First Complaint: \_\_\_\_\_ / \_\_\_\_\_ / \_\_\_\_\_  
Month Day Year

Instruction: Please supply all of the information requested below. If payment was made under more than one name or exporter identification number, please identify all possible names and EINs. Attach additional sheets if necessary. This form is to be used only by exporters who have filed complaints in the Court of International Trade. Any forms submitted by exporters who do not have a case pending will not be processed.

1. Name of Plaintiff(s):
2. Exporter Identification Number(s):
3. Exporter Address(es):
4. Please list all complaints and date of filing in the Court of International Trade covered by this refund claim form and attach copies to this form.
5. Has the plaintiff previously received from the Government any refunds of Harbor Maintenance Tax payments on exports for any reason? \_\_\_\_\_ No. \_\_\_\_\_ Yes.

If the answer is "yes," please specify the dates and amounts of such refunds;

6. Name and Address to which Harbor Tax Maintenance Payment Report and Certification is to be Mailed

\_\_\_\_\_ Payment Information or Documentation Supplied by Plaintiff  
(optional)

\_\_\_\_\_ Authorized Representative of Plaintiff

Court No. \_\_\_\_\_

## HARBOR MAINTENANCE TAX PAYMENT REPORT AND CERTIFICATION

## A. To be completed by Customs:

1. *Name of Plaintiff (including all known variations):*
2. *Exporter Identification Number:*
3. *Quarterly Payments Not Previously Refunded to Plaintiff*

Payment Quarter	Amount Paid	Date Paid
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Total Amount Paid \_\_\_\_\_

## 4. Refunds, If Any, Previously Made By Customs

Payment Quarter	Amount Refunded	Date Refunded
-----------------	-----------------	---------------

Total Amount Refunded \_\_\_\_\_

## 5. Total Amount Due \_\_\_\_\_

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Signature of Customs

## B. To be completed by plaintiff:

I hereby certify on behalf of plaintiff that, to the best of my knowledge and belief, plaintiff paid the Harbor Maintenance Tax payments listed in number 3 and is entitled to a refund of those payments as listed in number 5.

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Authorized Representative of Plaintiff

## ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C98/63 6/9/98 Fogue, J.	Archer World Wide	97-3-00392	4202/12.20, or 4202/92.90, or 20% 4202/45	3924/10.50 3.4%	SGI Inc. v. U.S., 122 F.3d 1458	Chicago Insulated soft-sided cooler bags
C98/64 6/9/98 Fogue, J.	Archer World Wide	97-10-01923	4202/12.20, or 4202/92.90, or 20% 4202/45	3924/10.50 3.4%	SGI Inc. v. U.S., 122 F.3d 1468	Chicago Insulated soft-sided cooler bags
C98/65 6/10/98 Wallach, J.	Hi-Tec Sports, U.S.A.	92-11-00780	6404/19.115 10.5%	6403/91.90 10% 6403/91.60 8.5% 6403/40.60 8.5%	Agreed statement of facts	San Francisco Various styles of hiking or service boots
C98/66 6/10/98 Wallach, J.	Hi-Tec Sports, U.S.A.	93-5-00278	6404/19.115 10.5%	6403/91.90 10% 6403/91.60 8.5% 6403/40.60 8.5%	Agreed statement of facts	San Francisco Various styles of hiking or service boots
C98/67 6/10/98 Wallach, J.	Hi-Tec Sports, U.S.A.	94-3-00169	6404/19.115 10.5%	6403/91.90 10% 6403/91.60 8.5% 6403/40.60 8.5%	Agreed statement of facts	San Francisco Various styles of hiking or service boots
C98/68 6/11/98 Carmean, C.J.	JMS Specialty Foods	94-9-00504	7013/39.20 30%	7010/90.50 Free of duty	Milwaukee Glass food packing jars	
C98/69 6/11/98 Carmean, C.J.	Mark D. Myers d/b/a VMC USA	94-1-00057	7013/39.40 7.2%	7010/90.50 Free of duty	Baltimore Glass preserving jars	

C98/70 6/11/98 Carman, C.J.	Mark D. Myers dba VMC USA	95-5-00737	7013.39 10 12.5%	7010.90 50 Free of duty	Baltimore Glass preserving jars
C98/71 6/19/98 Tsoucalas, J.	SGL Carbon Corp.	95-2-00182	8545.90 4000 4.9%	6902.90 10 Free of duty	Not stated Cathode blocks
C98/72 6/22/98 Tsoucalas, J.	Allied Film & Video	90-11-00610	3926.90.90 through 3926.90.98 Not stated	8522.90 75 Not stated	Technicolor Videocassette <i>v.</i> U.S., 19 CIT 942 (1996)
C98/73 6/22/98 Tsoucalas, J.	Crest Cassette Corp.	90-4-00172	3926.90.90 through 3926.90.98 Not stated	8522.90 75 Not stated	Technicolor Videocassette <i>v.</i> U.S., 18 CIT 942 (1996)
C98/74 6/22/98 Tsoucalas, J.	Crest Cassette Corp.	90-11-00611	3926.90.90 through 3926.90.98 Not stated	8522.90 75 Not stated	Technicolor Videocassette <i>v.</i> U.S., 18 CIT 942 (1996)
C98/75 6/22/98 Tsoucalas, J.	Technicolor Videocassette, Inc.	90-2-00076	3926.90.90 through 3926.90.98 Not stated	8522.90 75 Not stated	Technicolor Videocassette <i>v.</i> U.S., 19 CIT 942 (1996)
C98/76 6/22/98 Tsoucalas, J.	Technicolor Videocassette, Inc.	90-7-00474	3926.90.90 through 3926.90.98 Not stated	8522.90 75 Not stated	Technicolor Videocassette <i>v.</i> U.S., 19 CIT 942 (1996)
C98/77 6/22/98 Tsoucalas, J.	Technicolor Videocassette, Inc.	94-1-00943	3926.90.90 through 3926.90.98 Not stated	8522.90 75 Not stated	Technicolor Videocassette <i>v.</i> U.S., 19 CIT 942 (1996)
C98/78 6/22/98 Tsoucalas, J.	Technicolor Videocassette, Inc.	94-2-00133	3926.90.90 through 3926.90.98 Not stated	8522.90 75 Not stated	Technicolor Videocassette <i>v.</i> U.S., 19 CIT 942 (1996)

## ABSTRACTED CLASSIFICATION DECISIONS—Continued

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C98/79 6/22/98 Tsoucalas, J.	Technicolor Videocassette, Inc.	94-4-00202	3926.90.90 through 3926.90.98 Not stated	8522.90.75 Not stated	Technicolor Videocassette <i>v.</i> U.S., 19 CIT 942 (1995)	Detroit V-0 VHS Cassettes
C98/80 6/22/98 Tsoucalas, J.	Technicolor Videocassette, Inc.	93-4-00227	3926.90.90 through 3926.90.98 Not stated	8522.90.75 Not stated	Technicolor Videocassette <i>v.</i> U.S., 19 CIT 942 (1995)	Los Angeles V-0 VHS Cassettes
C98/81 6/22/98 Tsoucalas, J.	Technicolor Videocassette, Inc.	94-4-00234	3926.90.90 through 3926.90.98 Not stated	8522.90.75 Not stated	Technicolor Videocassette <i>v.</i> U.S., 19 CIT 942 (1995)	Detroit V-0 VHS Cassettes
C98/82 6/22/98 Tsoucalas, J.	Titan Media Co.	93-9-00531	3926.90.90 through 3926.90.98 Not stated	8522.90.75 Not stated	Technicolor Videocassette <i>v.</i> U.S., 19 CIT 942 (1995)	Los Angeles, Savannah, Knoxville V-0 VHS Cassettes
C98/83 6/22/98 Tsoucalas, J.	Titan Media Co.	93-9-00642	3926.90.90 through 3926.90.98 Not stated	8522.90.75 Not stated	Technicolor Videocassette <i>v.</i> U.S., 19 CIT 942 (1995)	Los Angeles, V-0 VHS Cassettes
C98/84 6/22/98 Tsoucalas, J.	Titan Media Co.	93-12-00782	3926.90.90 through 3926.90.98 Not stated	8522.90.75 Not stated	Technicolor Videocassette <i>v.</i> U.S., 19 CIT 942 (1995)	Los Angeles, Knoxville V-0 VHS Cassettes
C98/85 6/22/98 Tsoucalas, J.	Titan Media Co.	94-2-00121	3926.90.90 through 3926.90.98 Not stated	8522.90.75 Not stated	Technicolor Videocassette <i>v.</i> U.S., 19 CIT 942 (1995)	Los Angeles, Knoxville V-0 VHS Cassettes
C98/86 6/22/98 Tsoucalas, J.	Titan Media Co.	95-1-00007	3926.90.90 through 3926.90.98 Not stated	8522.90.75 Not stated	Technicolor Videocassette <i>v.</i> U.S., 19 CIT 942 (1995)	Knoxville V-0 VHS Cassettes

CB8/87 6/23/98 Carman, C.J.	Mark D. Myers a/c Glassware Int'l Inc. 93-4-00240	7013.98.50 30%	7010.90.50 Free of duty	Agreed statement of facts	San Francisco Glass preserving jars
CB8/88 6/23/98 Carman, C.J.	Mark D. Myers dba VMC USA NSC Corp.	7013.96.50 30%	7010.90.50 Free of duty	Agreed statement of facts	Baltimore Glass preserving jars
CB8/89 6/23/98 Carman, C.J.	94-12-00791. 95-5-00740	4202.92.30 and 4202.92.45 20%	3924.10.50 6307.90.99 7%	Agreed statement of facts	Chicago Soft sided cooler bags with an outer sur- face of plastics or textiles
CB8/90 6/23/98 Carman, C.J.	Mark D. Myers dba VMC USA	7013.39.20 30%	7010.90.50 Free of duty	Agreed statement of facts	Los Angeles Glass preserving jars
CB8/91 6/23/98 Carman, C.J.	Mark D. Myers dba VMC USA	7013.39.20 7.2%	7013.39.20 30%	Agreed statement of facts	Los Angeles Glass preserving jars
CB8/92 6/24/98 Pogue, J.	95-7-00926	4823.90.85 5.3%	4823.90.85 5.3%	Agreed statement of facts	Chicago Bag expanders
CB8/93 6/24/98 Pogue, J.	95-7-00927	4202.12.20, 4202.32.20, 20%	6902.90.10 4.9%	Agreed statement of facts	Seattle Cathode Blocks
CB8/94 6/29/98 Toucalas, J.	96-12-02655	8545.90.4000 4.9%	3826.90.90 through 3926.90.98 Not stated	Technicolor Video cassette, Inc. u. U.S., 19 CIT 942 (1995)	Los Angeles V-0 VHS cassettes
CB8/95 6/29/98 Toucalas, J.	SGL Carbon Corp.	90-9-01238	8522.90.75 Not stated	Technicolor Video cassette, Inc. u. U.S., 19 CIT 942 (1995)	Detroit V-0 VHS cassettes
	Crest Cassette Corp.	90-9-00498	3826.90.90 through 3926.90.98 Not stated		
	Technicolor Video cassette, Inc.	94-7-00417	8522.90.75 Not stated		

## ABSTRACTED VALUATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	VALUATION	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
V9811 6/26/98 Walluch, J.	Motorambar, Inc.	95-8-00996	Transaction value	At value excluding royalties and com- missions paid to Dai-Ichi Trade Corp.	Agreed statement of facts	San Juan 112 Nissan Motors Pathfinders vehicles





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